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Supreme Court, U.S.
FILED
SEP 8 2000
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No. 00-228

In the Supreme Court of the United States

MARGARET A. BAGLEY, WARDEN,
Petitioner,

-vs-

FREDERICK WHITE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

DAVID H. BODIKER
Ohio Public Defender

KORT GATTERDAM
Assistant State Public Defender
Counsel of Record

J. JOSEPH BODINE, JR.
Assistant State Public Defender

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215-2998
(614) 466-5394

COUNSEL FOR FREDERICK WHITE

10

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Petitioner, FREDERICK WHITE, through undersigned counsel, respectfully requests leave to file his Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of costs or fees and to proceed *in forma pauperis* pursuant to Rule 39.

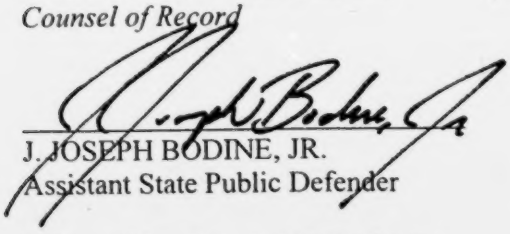
Petitioner was represented by state-appointed counsel on appeal to the Sixth Circuit pursuant to Ohio Rev. Code Ann. § 120.06. Petitioner's appeal to the United States Court of Appeals for the Sixth Circuit proceeded *in forma pauperis*.

Petitioner's affidavit in support of this motion is attached.

Respectfully submitted,

DAVID H. BODIKER
Ohio Public Defender

KORT GATTERDAM
Assistant State Public Defender
Counsel of Record



J. JOSEPH BODINE, JR.
Assistant State Public Defender

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215-2998
(614) 466-5394

COUNSEL FOR FREDERICK WHITE

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AFFIDAVIT OF INDIGENCY

I, FREDERICK WHITE, being first duly sworn, depose and say that in support of my motion to petition for a Writ of Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of petitioning for a Writ of Certiorari are true.

1. Are you presently employed? NO

A. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

B. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received. 9/19/88 $650.00 per week

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? NO

A. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. _____

3. Do you own any cash or checking or savings account? NO

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property excluding ordinary household furniture and clothing? No

A. If the answer is yes, describe the property and state its approximate value.

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons. NA

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Frederick White
FREDERICK WHITE

Duly witnessed and sworn before me, a Notary Public, this 7th day of September, 2000.

NOTARY PUBLIC

NOTARIAL SEAL STATE OF OHIO

J. JOSEPH BODINE, ATTORNEY AT LAW
NOTARY PUBLIC, STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.

No. 00-228

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FREDERICK WHITE'S BRIEF IN OPPOSITION TO THE WARDEN'S PETITION FOR WRIT OF CERTIORARI

DAVID H. BODIKER
Ohio Public Defender

KORT GATTERDAM
Assistant State Public Defender
Counsel of Record

J. JOSEPH BODINE, JR.
Assistant State Public Defender

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215-2998
(614) 466-5394

COUNSEL FOR FREDERICK WHITE

QUESTIONS PRESENTED

1] Is Ohio Rule of Appellate Procedure 26(B) so inadequate and inconsistently applied by the Ohio courts that it may not serve as the basis for the procedural default of a claim presented in a petition for writ of habeas corpus?

2] Does a criminal defendant enjoy the right to the effective assistance of counsel on a first direct appeal of right from a criminal conviction?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

3. Ohio R. App. P. 26(B) (Rule 26(B)) is reproduced in the appendix to this brief in opposition.

4. Current and Former S. Ct. Prac. R. II(2)(D)(1) are reproduced in the appendix to this brief in opposition.

STATEMENT OF THE CASE AND FACTS

On February 16, 1989, the Cuyahoga County Grand Jury indicted Frederick White for one count of aggravated murder with a firearm specification, two counts of felonious assault with firearm specifications, and one count of having a weapon under disability. The State alleged that Mr. White shot and killed his ex-wife Kim Hawkins, as she was leaving her job, in the early morning hours of November 5, 1988.

On May 12, 1989, after a jury trial, Mr. White was found guilty on all counts and firearm specifications. On May 15, 1989, he was sentenced to twenty years to life for aggravated murder, three years for the firearm specification, and eight to fifteen years on each count of felonious assault. The sentences were imposed consecutively to one another.

Mr. White timely appealed to the Cuyahoga County Court of Appeals. On January 31, 1991, the court of appeals overruled Mr. White's assignments of error. State v. White, No. 57944 (Ohio App. Cuyahoga Co., Jan. 31, 1991). However, the court sua sponte ordered the trial court to vacate one of the convictions for felonious assault under the allied offenses doctrine. After his convictions were affirmed, Mr. White was without counsel until he wrote to the Office of the Ohio Public Defender.

Mr. White asked the Ohio Public Defender to review his case after the time had expired to file a timely motion for reconsideration in the court of appeals (ten days) or a timely appeal to the Ohio Supreme Court (thirty days). Pursuant to the Office of the Ohio Public Defender's statutory mandate (Ohio Rev. Code Ann. § 120.06), Mr. White's case was reviewed and it was determined that he was denied the effective assistance of appellate counsel.

On February 16, 1994, Mr. White, through counsel, elected to complete his direct appeal of right by filing an Application for Reopening with the court of appeals pursuant to Ohio v.

Murnahan, 584 N.E.2d 1204 (1992), and Ohio App. R. 26(B). White asserted four issues that appellate counsel failed to raise during the first component of White's direct appeal of right. On October 19, 1994, the court of appeals overruled Mr. White's claims. State v. White, Mot. No. 49174 (Ohio App. Cuyahoga Co., Oct. 19, 1994). Mr. White timely appealed to the Supreme Court of Ohio. On April 26, 1995, the Supreme Court of Ohio affirmed the court of appeals decision. State v. White, 647 N.E.2d 787 (1995).

Mr. White filed a petition for writ of certiorari with this Court. Mr. White's conviction became final on October 25, 1995, when this Court denied his the petition.

On December 27, 1995, Mr. White filed a petition for writ of habeas corpus with the United States District Court, Northern District, Eastern Division. Mr. White raised four grounds for relief. The Warden filed a Return of Writ asserting that Mr. White's claims were barred on the grounds of procedural default. On July 23 1996, the Magistrate Judge recommended that the claims be dismissed due to procedural default. Mr. White filed timely objections. On August 14, 1997, the District Court adopted the Magistrate's Report and Recommendation without analysis.

Mr. White was granted a certificate of appealability and pauper status by the United States Court of Appeals for the Sixth Circuit on March 16, 1998. The Sixth Circuit reversed the district court. While it declined to address the adequacy of Ohio App. R. 26(B), the court held that Mr. White could establish cause even if his claims were procedurally defaulted. The court remanded the case to the district court to determine whether Mr. White was prejudiced from appellate counsel's ineffectiveness.

The Warden petitioned the Sixth Circuit to rehear the case *en banc*, and the court summarily denied the petition. The Warden then petitioned this Court for a writ of certiorari. Mr. White now submits his brief in opposition.

REASONS WHY THE PETITION SHOULD BE DENIED

I. OHIO APPELLATE RULE 26(B) DID NOT PROVIDE MR. WHITE AND SIMILARLY SITUATED INDIVIDUALS WITH A FAIR AND REASONABLE OPPORTUNITY TO HAVE THEIR CLAIMS HEARD.

A. Appellate Rule 26(B) was not in effect until two years after Mr. White filed his application to reopen.

A state procedural rule that does not provide a habeas petitioner with an adequate opportunity to present a federal claim to the state courts constitutes an inadequate rule, and any state procedural default which is a product of that inadequate system should not be honored by the federal courts. See, e.g. Michel v. Louisiana, 350 U.S. 91, 93 (1955) (test in determining whether federal court will consider merits of a claim not presented to state court is whether the defendant had a reasonable opportunity to have the claim heard and determined by the state court); Reece v. Georgia, 350 U.S. 85, 89-90 (1955). If a state procedural requirement consistently prevents a "fairly presented" claim from being heard on the merits, the state procedures are inadequate. Kim v. Villalobos, 799 F.2d 1317, 1321 (9th Cir. 1986); Easter v. Endell, 37 F.3d 1343, 1345 (8th Cir. 1994).

In Ohio v. Murnahan, 584 N.E.2d 1204 (1992), the Supreme Court of Ohio determined that appellate ineffectiveness claims must be litigated as part of the direct appeal process and not in post-conviction proceedings. Prior to Murnahan, there was statewide inconsistency regarding where such claims should be presented. See Manning v. Alexander, 912 F.2d 878 (6th Cir. 1990).

Because of Murnahan, Ohio enacted Appellate Rule 26(B). Rule 26 (B) requires claims of appellate ineffectiveness to be filed within ninety days of the original court of appeals

decision affirming a conviction or an appellant must establish "good cause" for not filing the application within ninety days. Rule 26(B) went into effect on July 1, 1993.

Despite the purported effective date of Rule 26(B), the Supreme Court of Ohio's former S. Ct. Prac. R. II(2)(D)(1) divested the Ohio courts of appeals of jurisdiction to consider any action once a notice of appeal was filed in the Supreme Court of Ohio. "After an appeal is perfected from a court of appeals to the Supreme Court, the court of appeals is divested of jurisdiction...to rule on an application for reconsideration filed with the court of appeals pursuant to Rule 26 of the Rules of Appellate Procedure... ." (Emphasis added).

In Ohio v. Wogenstahl, 662 N.E.2d 16, 17 (1996), decided three years after Rule 26(B)'s enactment, the Supreme Court of Ohio expressly held that former S. Ct. Prac. R. II(2)(D)(1) trumped Rule 26(B) and divested the courts of appeals of jurisdiction to entertain Rule 26(B) applications. Because former S. Ct. Prac. R. II(2)(D)(1) specified that the courts of appeals retained jurisdiction only to rule on applications for reconsideration as opposed to applications to reopen, the supreme court held that the courts of appeals did not retain jurisdiction to rule upon an application for reopening under Rule 26(B). Id.; see also Ohio v. Howe, 652 N.E.2d 193 (1995). It was only after Wogenstahl that the Supreme Court of Ohio corrected the obvious conflict between Rule 26(B) and former S. Ct. Prac. R. II(2)(D)(1). Therefore, Rule 26(B) was not in effect until two years after Mr. White filed his application to reopen in the court of appeals.

Because Ohio courts of appeals did not have jurisdiction to address claims of appellate ineffectiveness until 1996, at the time Mr. White filed his application, the Rule 26(B) process for litigating appellate ineffectiveness claims provided only a theoretical remedy. See Marino v. Regan, 332 U.S. 561, 569-570 (1947). The Supreme Court of Ohio, through Rule 26(B), created

the exclusive remedy for raising appellate ineffectiveness claims, a delayed motion for reconsideration filed with the courts of appeals that was part and parcel of the original direct appeal of right. The Supreme Court of Ohio's own rule deprived the appellate courts of the jurisdiction they needed to entertain these appellate ineffectiveness claims. During this time period, within which Mr. White's case falls, Ohio did not provide appellants a reasonable opportunity to present their ineffectiveness claims. Thus, individuals like Mr. White, who had been deprived of their right to the effective assistance of appellate counsel, had no opportunity to be heard regarding those allegations.

B. At the time of Mr. White's Delayed Motion for Reconsideration was pending, the Ohio Courts did not consistently apply the ninety day time provision contained in Rule 26(B).

For the Warden to meet her burden of proof as to the affirmative defense of procedural default, she must demonstrate that the state procedural rule is a "firmly established and regularly followed state practice." Ford v. Georgia, 498 U.S. 411, 423-424 (1991); Reynolds v. Berry, 146 F.3d 345, 347 (6th Cir. 1998). The Warden's affirmative defense in the present case focuses upon Rule 26(B). She alleges that Mr. White did not comply with the following time limitations contained within the Rule: "An Application shall be filed in the court of appeals where the appeal was decided within ninety days from the journalization of the appellate judgment unless the appellant shows good cause for filing at a later time." Ohio R. App. P. 26(B)(1).

The Rule contains two filing provisions: 1) the application must be filed within ninety days or 2) the appellant must show "good cause" for the untimely filing. As will be demonstrated herein, the Warden cannot meet her burden of proof because the state courts have failed to consistently apply either filing provision.

Rule 26(B) is very concise, applications "shall be filed in the court of appeals where the appeal was decided within ninety days . . ." or the appellant must show good cause. The standard is very simple, easy to administer and not subject to conflicting interpretations. The time limitation is mandatory unless the appellant can show good cause.

Despite the objective nature of the rule and its mandatory application, Ohio courts have inconsistently applied this rule. In the following cases, the Ohio courts ignored the ninety day time limitation and reached the merits of delayed applications without showing good cause despite the fact that the applications were untimely. Ohio v. Smith, 640 N.E.2d 813 (1994)(five years); Ohio v. Timmons, 640 N.E.2d 814 (1994)(ten years); Ohio v. Bonnell, 643 N.E.2d 108 (1994)(three years); Ohio v. Hamblin, 643 N.E.2d 545 (1994)(eight years); Ohio v. Hull, 643 N.E.2d 546 (1994)(three years); Ohio v. McKenzie, 664 N.E.2d 926 (1996)(four years); Ohio v. Dumas, 663 N.E.2d 925 (1996)(four years); Ohio v. Doles, 665 N.E.2d 197 (1996)(two years); Ohio v. Sabo, 666 N.E.2d 560 (1996)(ten years) and Ohio v. Jones, 667 N.E.2d 384 (1996)(five years).

In numerous cases, Ohio courts disregarded the fact that applications were filed several years outside the ninety day requirement. These holdings are to be contrasted with the cases in which Ohio courts determined that the application was untimely because it was filed one day or months outside the ninety day time period. Ohio v. Winstead, 658 N.E.2d 722 (1996)(one day); Ohio v. Simpson, 666 N.E.2d 1118 (1996)(several days); Ohio v. Cobb, 643 N.E.2d 543 (1994) (ninety-seven days); Ohio v. Ballard, 643 N.E.2d 1147 (1994) (ninety seven days); Ohio v. Dever, 654 N.E.2d 1249 (1995) (five months); Ohio v. Whalen, 660 N.E.2d 1174 (1996) (nine months); Ohio v. Peeples, 643 N.E.2d 1112 (1994) (nine months); Ohio v. Eads, 652 N.E.2d 999

(1995)(nine months); Ohio v. Chubb, 652 N.E.2d 709 (1995)(ten months); Ohio v. Houston, 652 N.E.2d 1018 (1995)(one year); Ohio v. Lura, 661 N.E.2d 1085 (1996)(one year).

The inconsistent application of the ninety day provision is best highlighted by two cases decided by the Supreme Court of Ohio on the same day. In Ohio v. Winstead, 658 N.E.2d 722 (1996), the court determined that the filing of the motion one day beyond the ninety day provision constituted an untimely filing. The same day, in Ohio v. Green, 658 N.E.2d 721 (1996), the court ignored the fact that an application was filed fourteen days beyond the Rule and reviewed the merits of the issues presented.

The contradictory results demonstrate that the Ohio courts have been unable to consistently apply the objective ninety day requirement of Rule 26(B). Thus, the ninety day requirement of Rule 26 cannot serve as an adequate and independent basis for a procedural default because it is not a firmly established and regularly followed state practice.

C. At the time Mr. White's Rule 26(B) Application was pending, Ohio courts inconsistently applied the good cause exception to the ninety day rule provision contained in Rule 26(B).

Rule 26(B) grants appellate courts discretion to forgive a violation of the ninety day rule but only if the appellant can demonstrate good cause. The cases cited in this subsection will demonstrate that the Ohio courts have also applied the good cause provision in an inconsistent manner. See White v. Schotten, 201 F.3d 743, 751, (2000). The inconsistency on which Mr. White relies is not one where one appellant is determined to have proven good cause and another appellant is determined not to have proven good cause. This type of inconsistency is to be expected and warranted if the state courts are examining the facts unique to each case. Indeed, it is a different type of inconsistency that renders the Rule inadequate. While the state courts conclude in some cases that a particular fact can constitute good cause, in other cases the

appellate courts conclude that the very same factor can never constitute good cause. These types of inconsistent rulings render the Rule inadequate for federal habeas purposes.

The facts most frequently cited as the basis for good cause by untimely appellants during the time of Mr. White's application was the enactment of Rule 26(B) itself. Numerous appellants complained that they could not be expected to comply with the time limits contained in Rule 26(B) because it had not been enacted when the appellate courts decided their cases. Several Ohio courts found that the enactment of the Rule was good cause. Ohio v. White, 652 N.E.2d 1020 (1995); Ohio v. Spaulding, 643 N.E.2d 112 (1994); Ohio v. Peeples, 643 N.E.2d 1112 (1994). In other cases, the courts held that delayed applications could have been filed prior to the enactment of Rule 26(B) pursuant to Ohio R. App. P. 14, and therefore, the enactment of the Rule was not good cause. Ohio v. Reddick, 647 N.E.2d 784 (1995); Ohio v. Spisak, 652 N.E.2d 719 (1995); Ohio v. Wickline, 658 N.E.2d 1052 (1996); Ohio v. Williams, 659 N.E.2d 1253 (1996).

Pro se appellants during the relevant time period often cited to their ignorance of the law and lack of access to legal material as good cause. At least one Ohio court determined that pro se status constitutes good cause. Ohio v. Dillon, No. 725 1996 WL 467303 (Mont. Ct. App. Aug. 15, 1996). Other courts rejected this argument. Ohio v. Thrower, 643 N.E.2d 1149 (1994); State v. Witlicki, 658 N.E.2d 275 (1996).

Other appellants cited to their issues and that they had colorable merit. Some courts adopted this reasoning as supporting good cause. Ohio v. Sparks, No. C-84-143 (Lucas Ct. App. Feb. 11, 1997); Ohio v. Williams, 1995 WL 338613, No. 88-J-26 (Jefferson Ct. App. June 1, 1995); Ohio v. Flowers, 1998 WL 456453, No. C-92-337 (Lucas Ct. App. July 10, 1998). One court excused the failure to comply with the ninety day provision because the application

claimed that appellate counsel was ineffective. Ohio v. Newlins, No. 87AP-222, 1993 WL 308390 (Franklin Ct. App. Aug. 5, 1993). If this were the proper test to determine "good cause," then all untimely applications would receive a merits review because the sole purpose of Rule 26(B) is to permit the litigation of appellate ineffectiveness claims.

Appellants often cited for good cause their inability to access their trial transcripts to identify the issues that were omitted from their direct appeals. Rule 26(B) mandates that the relevant portions of the transcript be attached to delayed applications. In Ohio v. Everette, 658 N.E.2d 720 (1996), the court ruled that under certain circumstances "great difficulties in obtaining a copy of the transcript could constitute good cause." In other cases, great difficulty in obtaining a transcript was not "good cause" if the issue could have been raised without access to a transcript. Ohio v. Bell, 652 N.E.2d 191 (1995); Ohio v. Houston, 652 N.E.2d 1018 (1995). Subsequently, the Supreme Court of Ohio ruled that if the relevant parts of the transcript were not attached to the delayed application, then the application was procedurally barred. Ohio v. McNeill, 700 N.E.2d 613 (1998). Finally, the Supreme Court of Ohio ruled that the courts of appeals are not required to provide an indigent appellant with a copy of his transcript to permit compliance with the rule. Ohio v. Nickelson, 661 N.E.2d 168 (1996).[1]

Some appellants cited as good cause the failure of their counsel to timely notify them of their adverse decisions in the courts of appeals. Appellants reasoned that this lack of timely notification precluded them from complying with the ninety day time period. Some Ohio courts accepted this lack of timely notification as "good cause." Ohio v. Everette, 658 N.E.2d 720 (1996); Ohio v. New, No. 94APA 10-1547 (Franklin Ct. App. Dec. 3, 1996).

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[1] McNeill and Nickelson violate the constitution by reminding one of "the 'age-old problem' of '[p]roviding equal justice for poor and rich, weak and powerful alike.'" M.L.B. v. S.L.J., 519 U.S. 102, 110 (1996), citing to Griffin v. Illinois, 351 U.S. 12, 16 (1956).

Finally, some appellants during the relevant time period cited to the malfeasance or nonfeasance of their Rule 26(B) counsel as good cause. Some Ohio courts under some circumstances found that Rule 26(B) counsel's ineffectiveness could establish good cause. Ohio v. Bort, No. 96CA 006597 (Lorain Ct. App. Oct. 30, 1997). Other courts rejected the theory that the ineffectiveness of Rule 26(B) counsel could ever constitute good cause. Ohio v. Pierce, 659 N.E.2d 1252 (1996); Ohio v. White, 647 N.E.2d 787 (1995); Ohio v. Williams, 659 N.E.2d 1253 (1996); Ohio v. Colwell, 660 N.E.2d 1173 (1996).

As demonstrated by the numerous appellate decisions above, the state courts have unfettered discretion to pick and choose which cases they will accept for review. Indeed, some Ohio appellate courts apply a standard under which "good cause" will never be found, others employ a standard under which "good cause" will always be found, and still others ignore the "good cause" requirement altogether and proceed instead to the actual merits of the applicant's claims.

California, like Ohio, had decreed an artificial ninety-day time period for reopening appeals to assert new claims of error, subject to a "good cause" exception. See Morales v. Calderon, 85 F.3d 1387 (9th Cir. 1996). The Ninth Circuit found that there was no procedural bar in federal habeas because at the time of Morales' state court decision, because there were no clear guidelines for determining when a petitioner could file his petition beyond the ninety-day filing period. In addressing the "good cause" component, the court stated the following:

> We must emphasize that the issue here is not whether the State is allowed to invoke its rule irregularly for its own purposes. The question is whether a State rule that is applied only randomly may preclude a federal court from entertaining a petitioner's federal claim on the merits. We conclude that the answer is "no."

Morales, 85 F.3d at 1392.

The state courts of New Mexico have a procedural rule similar to Rule 26(B) in the sense that it precludes review of a question not properly preserved unless the courts "exercise discretion to consider fundamental rights that have been infringed without preservation of error." Gutierrez v. Moriarty, 922 F.2d 1464, 1470 (10th Cir. 1991). In refusing to recognize New Mexico's rule as adequate, the Tenth Circuit cited to the fact that there were no cases articulating the parameters within which New Mexico courts could exercise discretion. Id. at 1470 citing Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 233-34 (1969).

When faced with sporadic and inconsistent applications of state procedural rules, other circuits have refused to apply a procedural bar to the applicant's constitutional claims. King v. Puckett, 1 F.3d 280, 283-84 (5th Cir. 1993); Smith v. Black, 970 F.2d 1383, 1386-88 (5th Cir. 1992). Grubbs v. Delo, 948 F.2d 1459 (8th Cir. 1991); Delap v. Dugger, 890 F.2d 285, 300 (11th Cir. 1989).

The Supreme Court of Ohio has never considered or provided direction to Ohio appellate courts regarding the definition of "good cause." Without that direction, the Ohio appellate courts have inconsistently applied the "good cause" standard. Thus, the "good cause" component of Rule 26(B) cannot serve as an adequate and independent basis for a procedural default because it is not a firmly established and regularly followed state practice.

Because Ohio R. App. P. 26(B) is inadequate and has not been consistently applied by the Ohio courts, it may not cause the procedural default of Mr. White's claims. The Sixth Circuit declined to fully address Mr. White's arguments related to the adequacy of the Rule, and he reasserts those arguments here. If the Rule itself is inadequate, then Mr. White need not assert cause for the procedural default of his claims.

II. A CRIMINAL DEFENDANT ENJOYS THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON A DIRECT APPEAL OF RIGHT, AND THE STATES ARE FREE TO STRUCTURE THE DIRECT APPEAL PROCESS AS THEY SEE FIT.

A. This case does not present a question of great importance or scope worthy of certiorari review.

The Sixth Circuit declined to address the adequacy of Rule 26(B) finding instead that even if the rule were sufficiently adequate to invoke a procedural default of White's claims, he could nevertheless establish cause for their default. And even though the Rule itself is inadequate, one thing is certain, in Ohio, claims of appellate ineffectiveness must be raised on direct appeal and are not cognizable in any form of post-conviction proceeding. Because those claims may only be asserted in proceedings that are part of a first, direct appeal of right, they are subject to the Sixth and Fourteenth Amendment guarantees that an appellant be afforded the right to the effective assistance of counsel.

At the urging of the Ohio Attorney General, Ohio created a bifurcated direct appeal process designed to address claims of error arising from a criminal trial as well as claims of ineffective assistance of appellate counsel. Prior to 1992, claims of appellate ineffectiveness were addressed in a variety of ways in Ohio. See Manning v. Alexander, 912 F.2d 878 (1990). In 1992, the Supreme Court of Ohio decided Ohio v. Murnahan, 584 N.E.2d 1204 (1992), in which the court "emphatically held" that claims of appellate ineffectiveness were not cognizable in any form of post-conviction proceeding. See White v. Schotten, 201 F.3d 743, 752 (2000). Rather, the court held, claims of appellate ineffectiveness must be decided in the context of the direct appeal and be pursued through an Application to Reopen.

During the Murnahan proceedings in the Supreme Court of Ohio, the Ohio Attorney General entered an appearance as a friend of the court and argued on behalf of the State of Ohio.

In the brief, the Ohio Attorney General vehemently argued that these claims of appellate ineffectiveness could not be raised in post-conviction proceedings. (See Warden's Amicus Brief to the Supreme Court of Ohio, A-22 - A-40.) The attorney general argued that not only were appellate ineffectiveness claims not cognizable in post-conviction, but they "must be presented in the chain of direct appeal." (Warden's Amicus Brief, p.4, A-30.). The very basis of the Ohio Attorney General's argument was to protect Ohio's interest in the finality of its criminal judgments from federal habeas corpus intervention:

> The Ohio Attorney General represents the State's interests in collateral attacks on criminal convictions which name as the respondent a state official, such as the Warden of the correctional facility at which the petitioner is detained. This includes all Ohio prisoners' petitions for federal habeas corpus relief.
>
> As explained herein, Ohio's procedural rules for handling claims of ineffective assistance of appellate counsel are important for determining the procedural posture of the same allegations in federal habeas corpus. The decision below indicates that at least some room for debate exists in Ohio as to the proper state procedural vehicle for raising claims of appellate ineffectiveness. To the extent Ohio procedural law is unclear, federal courts may hear such claims in the first instance, despite the refusal of Ohio courts to have reviewed them. *This leads to a lack of respect for Ohio procedural requirements, both by federal courts and prospective federal litigants.* Litigants aiming for federal habeas review have little incentive to obey Ohio procedural requirements, secure in the knowledge that the merits of their claims will be addressed by federal courts anyway.

(Amicus Brief, p.1, A-27,emphasis added.)

Based upon the attorney general's argument, Applications for Reopening were made "part of the chain of direct appeal" by the Supreme Court of Ohio, and since then, direct appeals from criminal convictions in Ohio have been conducted in two parts. The first leg of the direct appeal proceeds in the traditional sense commencing with a notice of appeal, proceeding then to briefing, argument and written opinion by the reviewing court. Appellants may then seek discretionary review in the Supreme Court of Ohio and ultimately with this Court. The criminal

conviction is not final, however, until the Ohio appellate court determines whether the individual was afforded the effective assistance of appellate counsel. The filing of the application to reopen renders the criminal conviction un-final until such time as the application to reopen is resolved. See Foster v. Edwards, 165 F.2d 27 (6th Cir. 1998)(unpublished).

If the appellant claims that he was denied the effective assistance of appellate counsel, an Application to Reopen pursuant to Ohio R. App. P. 26(B) may be filed in the appellate court within ninety days of the original decision or, any time thereafter, if the applicant can establish good cause for the delayed filing. The review process is controlled by the Ohio Rules of Appellate Procedure, is filed under the original case number and is decided by the original panel of appellate judges. The applicant may appeal an adverse decision, as a matter of right, to the Supreme Court of Ohio.

Having succeeded in creating the direct appeal process now in place for the very purpose of restricting habeas corpus review of Ohio cases, the Ohio Attorney General now complains to the federal courts that Rule 26(B) is unfair and somehow deserving of constitutional intervention. And rather than making this argument in the proper forum - the Ohio Legislature - the Ohio Attorney General is now asking this Court to intervene in state matters, disregard the direct appeal process Ohio has chosen to fashion, and force Ohio to create a review process that is not required or even contemplated by the United States Constitution.

B. The Warden should not be permitted to have her cake and eat it too.

The doctrine of judicial estoppel protects the integrity of the judicial process by preventing a party from taking a position inconsistent with a position successfully and unequivocally asserted by the same party in a prior proceeding. United States v. Owen, 54 F.2d 271 (6th Cir. 1995). Courts have used a variety of metaphors to describe the doctrine,

characterizing it as a rule against "playing 'fast and loose' with the court," "blowing hot and cold as the occasion demands," or "having one's cake and eating it too." Reynolds v. Comm'n of Internal Revenue, 861 F.2d 469, 472-73 (6th Cir. 1988). All of those metaphors fit here. The State's analysis is less an attempt to present an issue of constitutional magnitude to this Court than an attempt to rectify its own shortsighted, yet successful, attempt to change the structure of Ohio's review process, and it is done so only by blatantly misrepresenting to this Court the status of Ohio law.

Unable to point to any binding Ohio authority supporting its position, Petitioner relies on two miscellaneous dismissals from the Supreme Court of Ohio decided prior to the effective date of Ohio R. App. P. 26(B). The Warden completely ignores the entire basis of the Murnahan decision and instead cites two miscellaneous dismissals for the erroneous proposition that an Application to Reopen is a post-conviction matter. See Ohio v. Robinson, 660 N.E.2d 472 (1996); Ohio v. Sproat, 656 N.E.2d 342 (1995). Aside from the fact that Robinson and Sproat are miscellaneous dismissals that offer no guidance, and Murnahan is the seminal case governing applications to reopen, later cases have further clarified that App.R. 26(B) proceedings are part of the direct appeal process.

In early 1996, when Robinson was issued, the treatment of appellate ineffectiveness claims was a disaster due to conflicting rules that were still on the books. While the whole purpose of Murnahan was to take appellate ineffectiveness claims out of Ohio's post-conviction process, an Ohio Supreme Court Practice Rule remained that divested the appellate courts of jurisdiction to hear the claims. Former S. Ct. Prac. R. II(2)(D)(1). Thus, at the time of Robinson and Sproat, litigants with appellate ineffectiveness claims were being turned away from the appellate courts because the courts did not have jurisdiction and they were being turned away

from the trial courts because appellate ineffectiveness claims were no longer part of Ohio's post-conviction process pursuant to Murnahan and App. R. 26(B). See Ohio v. Howe, 652 N.E.2d 193 (1995); Ohio v. Wogensthal, 662 N.E.2d 16 (1996).

Finally, in April of 1996, the Supreme Court of Ohio reaffirmed that appellate ineffectiveness claims were not part of the post-conviction process. Former S. Ct. Prac. R. II(2)(D)(1) was amended so that appellate courts would have jurisdiction to hear ineffective assistance of appellate counsel claims. That process, according to the Supreme Court of Ohio and the Sixth Circuit, is the continuation of a criminal defendant's first appeal of right.

In Ohio v. Gillard, 714 N.E.2d 400 (1999), the Supreme Court of Ohio recognized that the App. R. 26(B) procedure was part of direct appeal. In Gillard, Ohio had moved the court to set an execution date upon denial of Mr. Gillard's App. R. 26(B) motion. The court denied the state's motion holding that Mr. Gillard was entitled to a stay of execution to permit him to pursue his petition for writ of certiorari to this Court. Traditionally, the Supreme Court of Ohio has granted stays of execution only to pursue a petition for certiorari after direct appeal is complete and not after the indirect or collateral review is completed. If rule 26(B) were a post-conviction matter, a stay would not have been granted. Additionally, the Supreme Court of Ohio has held that counsel should be appointed to assist with the application to reopen pursuant to App. R. 26(B). Ohio v. Getsy, 721 N.E.2d 117 (1999) (case remanded for the appointment of counsel "to represent appellant for purposes of an application for reopening.").

Ohio has chosen to structure the direct appeal process in this manner, and as a matter of comity, the Sixth Circuit respected Ohio's authority to define the process by which direct appeals are conducted. Far from creating a new rule of constitutional law, the Sixth Circuit properly deferred to Ohio's authority to structure the appellate review process as it sees fit. Nowhere in

the Sixth Circuit's decision will this Court find any statement even vaguely approaching the Petitioner's assertion that the Sixth Circuit has single handedly amended the Bill of Rights to include a new and heretofore unrecognized constitutional right to the effective assistance of post-conviction counsel.

This is a matter of state law on which the Supreme Court of Ohio has spoken, and consistent with this Court's mandate that federal courts respect state procedural rules, the Sixth Circuit properly accepted Ohio's definition of a direct appeal and accorded it the respect it is due. Petitioner repeatedly cites to Coleman v. Thompson, 501 U.S. 722 (1991), in the hopes of luring this Court into the belief that the Sixth Circuit has ignored this Court's authority. But White v. Schotten has nothing to do with post-conviction cases; therefore, it does not implicate Coleman, let alone defy it.

C. White v. Schotten cannot conflict with the authority in other Circuits because almost every other state addresses appellate ineffectiveness claims in post-conviction proceedings.

White cannot possibly conflict with the authority of other Circuit courts because Ohio is one of only two states in the union that treats claims of appellate ineffectiveness as part of the direct appeal process Most states expressly deal with the claims as part of a collateral, post-conviction proceeding: Ala. R. Crim. P. 32.2; Alaska R. Crim P. 12.72.020; Ariz. R. Crim. P. 32.1; Ark. R. Crim P. 37.1 and 37.2; Colo. R. Crim. P. 35; Del. R. Crim. P. 61; Haw. R. Penal P. 40; Idaho R. Crim. P. 19-4901; Ill. R. Crim. P. 5/122-1; Ind. R. Post-Conviction 1, § 9; Iowa R. Civ. P. 60-1506; Ky. R. Crim. P. 11.42; La. R. Crim. P. Art. 924; Me. 15 M.R.S.A. §2129(1)(A); Md. Art. 27 § 645A Ann., Mass. R. Crim. P. 30; Mich. R. Crim. P. 6.502; Minn. Stat. § 590.05; Miss. Stat. §99-39-1; Mo. R. Crim. P. 29.15; Mont. R. Crim. P. 46-21-105; Neb. R. Crim. P. 29-3001; N.J. Court R. 3:22-1; N.D. stat 29-32.1-01; Okl. 22 Okl. St. Ann. § 1089; Or. ORS

138.510; Penn. 42 Pa. C.S. § 9541; R.I. Gen. Laws §10-9.1-1; S.C. § 17-27-10; Tenn. Code. Ann. § 40-30-201; Utah R. Civ. P. 65B; Vt. 13 V.S.A. § 7131; Va. R. Crim. P. § 8.01-654; Wis. Stat. § 809.30; Wyo. Stat. §§ 7-14-101-108. A few states address the claims in habeas corpus proceedings: Cal. 12 C.P.C. § 1475; Conn. R. Sup. Ct. P. 23-22; Ga. Stat. § 9-14-1; Kan. KSA 60-1507; Nev. N.R.S. §34-360; N.H. Title LV, Chpt. 534; N.M. R. Crim. P. 5-802; S.D. Codified Laws § 21-27-1.1; Texas Ar. 11.071; Wash. R. App. P. 16.4; W. Va Code § 53-4A-1. New York addresses the claim through a petition for writ of *coram nobis*, New York v. Bachert, 509 N.E.2d 318 (1987), and North Carolina courts review the claim through a pleading that is styled a "motion for appropriate relief," N.C. Laws §15A-1411. Florida is the only other state that accommodates appellate ineffectiveness claims in its rules of appellate procedure. Fla. R. App. P. 9.140(j).

Were Ohio like most other states that specifically define their process for deciding claims of appellate ineffectiveness as post-conviction matters, the Warden might be correct. But Ohio is different. Because appellate ineffectiveness claims are reviewed in the chain of a direct appeal of right, White v. Schotten no more conflicts with these other circuits than it conflicts with Coleman v. Thompson itself.

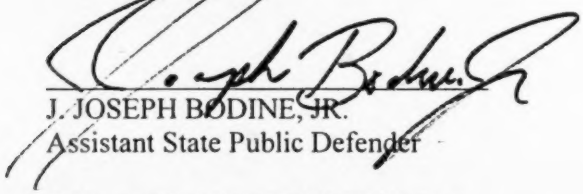
III. CONCLUSION.

Ohio Rule of Appellate Procedure 26(B) is inadequate; therefore, it cannot serve as the basis for a procedural default of Mr. White's claims. In addition, in Ohio, claims of appellate ineffectiveness lie within the exclusive province of the direct appeal courts. The structure of Ohio's direct appeal process is a matter best left to the discretion of the State of Ohio; consequently, Petitioner presents no legitimate reason to review the Sixth Circuit's decision.

Respectfully submitted,

DAVID H. BODIKER
Ohio Public Defender

KORT GATTERDAM
Assistant State Public Defender
Counsel of Record



J. JOSEPH BODINE, JR.
Assistant State Public Defender

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215-2998
(614) 466-5394

COUNSEL FOR FREDERICK WHITE

#119642

No. 00-228

In the Supreme Court of the United States

MARGARET A. BAGLEY, WARDEN,
Petitioner,

-vs-

FREDERICK WHITE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO FREDERICK WHITE'S BRIEF IN OPPOSITION TO THE WARDEN'S PETITION FOR WRIT OF CERTIORARI

DAVID H. BODIKER
Ohio Public Defender

KORT GATTERDAM
Assistant State Public Defender
Counsel of Record

J. JOSEPH BODINE, JR.
Assistant State Public Defender

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215-2998
(614) 466-5394

COUNSEL FOR FREDERICK WHITE

Ohio R. App. P. 26

APP R 26 APPLICATION FOR RECONSIDERATION; APPLICATION FOR REOPENING

(A) Application for reconsideration

Application for reconsideration of any cause or motion submitted on appeal shall be made in writing before the judgment or order of the court has been approved by the court and filed by the court with the clerk for journalization or within ten days after the announcement of the court's decision, whichever is the later. The filing of an application for reconsideration shall not extend the time for filing a notice of appeal in the Supreme Court.

Parties opposing the application shall answer in writing within ten days after the filing of the application. Copies of the application, brief, and opposing briefs shall be served in the manner prescribed for the service and filing of briefs in the initial action. Oral argument of an application for reconsideration shall not be permitted except at the request of the court.

(B) Application for reopening

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

(2) An application for reopening shall contain all of the following:

(a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;

(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

(3) The applicant shall furnish an additional copy of the application to the clerk of the court of appeals who shall serve it on the attorney for the prosecution. The attorney for the prosecution, within thirty days from the filing of the application, may file and serve affidavits, parts of the record, and a memorandum of law in opposition to the application.

(4) An application for reopening and an opposing memorandum shall not exceed ten pages, exclusive of affidavits and parts of the record. Oral argument of an application for reopening shall not be permitted except at the request of the court.

(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

(6) If the court denies the application, it shall state in the entry the reasons for denial. If the court grants the application, it shall do both of the following:

(a) appoint counsel to represent the applicant if the applicant is indigent and not currently represented;

(b) impose conditions, if any, necessary to preserve the status quo during pendency of the reopened appeal.

The clerk shall serve notice of journalization of the entry on the parties and, if the application is granted, on the clerk of the trial court.

(7) If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered. The time limits for preparation and transmission of the record pursuant to > App.R. 9 and > 10 shall run from journalization of the entry granting the application. The parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

(8) If the court of appeals determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the court or referred to a magistrate.

(9) If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order confirming its prior judgment.

(C) If an application for reconsideration under division (A) of this rule is filed with the court of appeals, the application shall be ruled upon within forty-five days of its filing.

Former Rule II(2)(D)(1) of the Supreme Court Rules of Practice:

S. Ct. Prac. R. II(2)(D)(1):
After an appeal is perfected from a court of appeals to the Supreme Court, the court of appeals is divested of jurisdiction, except to take action in aid of the appeal, to rule on an application for reconsideration filed with the court of appeals pursuant to Rule 26 of the Rules of Appellate Procedure, or to rule on a motion to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution.

Current Rule II(2)(D)(1) of the Supreme Court Rules of Practice:

S. Ct. Prac. R. II(2)(D)(1):
After an appeal is perfected from a court of appeals to the Supreme Court, the court of appeals is divested of jurisdiction, except to take action in aid of the appeal, to rule on an application timely filed with the court of appeals pursuant to Rule 26 of the Rules of Appellate Procedure, or to rule on a motion to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution.

EXHIBIT
B

*467303 NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

STATE of Ohio, Plaintiff-Appellee,

v.

Michael D. DILLON, Defendant-Appellant.

No. 725.
Court of Appeals of Ohio, Seventh District, Monroe County.
Aug. 15, 1996.

Application for Delayed Reconsideration.

Richard A. Yoss, Prosecuting Attorney, Woodsfield, for Plaintiff-Appellee.

Michael D. Dillon, pro se.

OPINION and *JOURNAL ENTRY*

PER CURIAM.

**1 On January 8, 1992, appellant was indicted on two counts. In count one, appellant was charged with aggravated burglary in violation of R.C. 2901.01. In count two, appellant was charged with rape in violation of R.C. 2907.02. Appellant entered pleas of not guilty and not guilty by reason of insanity.

On January 15, 1992, appellant's counsel filed a motion for examination, pursuant to R.C. 2945.371 and 2945.39, to determine his competence to stand trial, and his mental condition at the time of the offenses alleged in the indictment. On January 27, 1992, the trial court ordered that appellant be examined by the Forensic Diagnostic Center.

A report dated February 28, 1992, was prepared by the Forensic Diagnostic Center's clinical psychologist, and filed with the court on March 4, 1992.

On March 13, 1992, appellant entered a change of plea pursuant to a Crim.R. 11 agreement whereby appellee agreed to dismiss the charge of aggravated burglary in exchange for appellant's plea of guilty to the charge of rape. After the trial court accepted the plea agreement, appellant was sentenced to an indefinite term of not less then ten, nor more than twenty-five years.

On March 25, 1994, a motion to allow a delayed appeal was granted by this court. On November 15, 1995, oral argument was waived and the matter submitted to the court.

On January 12, 1996, this court affirmed the judgment of the trial court.

On May 24, 1996, appellant filed this application for delayed reconsideration as provided for under App.R. 26(B) and Rule 14(B).

In his application for delayed reconsideration, appellant alleges ineffective assistance of counsel and lists nine (9) separate assignments of error:

1. Appellate counsel was ineffective when he failed to present this assignment of error of ineffective assistance of trial counsel, when he coerced the appellant into a guilty plea, knowing the appellant was under the influence of antipsychotic drugs, and violated his due process clause and denied him a fair trial and violated his 6th and 14th Amendments to the United States Constitution of America.

2. Appellate counsel was ineffective when he never raised abuse and discretion of trial judge for not recusing himself from the bench when he had Parkinson Disease, and he was unfit to serve as judge, and violated this appellant's due process and his right to a fair trial, and appellate counsel violated the appellant's Sixth Amendment Constitutional right for failure to raise this error.

3. Appellate counsel was ineffective when he refused to raise the issue that the appellant was under the influence of drugs at the time of his guilty plea, in which he was coerced by his trial counsel to give the plea of guilty, which he did not know what he was doing at the time because of the antipsychotic drugs they had him on, violated his due process and his Sixth Amendment of the United States Constitution of America.

4. Appellate counsel was ineffective when he failed to raise ineffective assistance of trial counsel, for failure to object when trial court refused to hold a competency hearing under Crim.R. 11, in violation of R.C. 2945.37(A), denied him his Fifth, Sixth and Fourteenth Amendment of the United States Constitution of America, and Article I, Section 10 and 16 of the Ohio Constitution.

**2 5. Appellate counsel was ineffective when he raised the three assignments of error as separate

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issues they all involved the same error and were improperly argued, and denied the appellant effective assistance of appellate counsel, denied him his Sixth Amendment of the United States Constitution of America, and denied him his due process.

6. Appellate counsel was ineffective when he refused to raise ineffective assistance of trial counsel for failure to investigate into this case when their was no evidence that appellant was the perpetrator who did the robbery and rape, he was forced to plead guilty because of trial counsel's ineffectiveness, violated his Fifth, Sixth, and Fourteenth Amendment of the United States Constitution of America, Article I, Section 10 and 16 of the Ohio Constitution.

7. Appellant was prejudiced by and through the ineffective assistance of appellate counsel for not presenting all the issues and the main errors that occurred at trial, and refusing to bring these constitutional errors in question, to this honorable court of appeals when he was made aware of these errors by the appellant, and had informed him of them, violated his Sixth Amendment of the United States Constitution of America.

8. Appellate counsel was ineffective when he improperly argued that the appellant was not given a competency hearing under Crim.R. 11 that violated the appellant's due process and his Sixth Amendment of the United States Constitution of America which denied the appellant of effective assistance of appellate counsel.

9. Appellate counsel was ineffective when he failed to raise ineffective assistance of trial counsel, which denied the appellant of his Sixth Amendment that were assigned to his case during trial procedures because they had conflict of interest and prejudice towards the appellant, denied him a fair trial, in violation of his Sixth Amendment of the United State Constitution of America.

In appellant's original appeal to this court, appellant alleged three assignments of error, to-wit:

1. The appellant was denied due process of law as guaranteed by Article I, Sec. 16 of the Ohio Constitution and the Fourteenth Amendment of the United States Constitution when the trial court failed to hold a competency hearing.

2. The appellant was denied his right to the effective assistance of counsel as guaranteed by Article I, Sec. 10 of the Ohio Constitution and the Sixth Amendment to the United States Constitution when his counsel failed to request a competency hearing, failed to explore a sanity defense, and failed to conduct a reasonable investigation or defense.

3. The appellant was denied due process of law as guaranteed by the Article I, Sec. 16 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution as the proceedings resulting in his conviction were fundamentally unfair.

Appellant's assignments of error and claim of ineffective assistance of counsel are without merit.

**3 The relevant case on this issue is that of *State v. Murnahan* (1992), 63 Ohio St.3d 60, where, at paragraph three of the syllabus, the court stated:

"Where the time period for reconsideration in the court of appeals and direct appeal to the Supreme Court has expired, a delayed claim of ineffective assistance of appellate counsel must first be brought in an application for delayed reconsideration in the court of appeals where the alleged error took place, pursuant to App.R. 26 and 14(B), and if delayed reconsideration is denied then the defendant may file for delayed appeal in the supreme court, pursuant to section 8, Rule II of the Rules of Practice of the Supreme Court."

The applicable appellate rule in this case is that of App.R. 26 titled "Application for reconsideration; application for reopening."

"(B) Application for reopening.

"(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment *unless the applicant shows good cause* for filing at a later time. (Emphasis added).

"(2) An application for reopening shall contain all of the following:

" * * *

"(C) One or more assignments of error or arguments in support of assignments of error *that previously were not considered on the merits in the case by any appellate court* or that were considered on an

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incomplete record because of appellate counsel's deficient representation. (Emphasis added).

" * * *

"(5) An application for reopening shall be *granted if there is genuine issue* as to whether the applicant was deprived of the effective assistance of counsel on appeal."

Appellate Rule 14(B), which states "Enlargement or reduction of time", says:

"For good cause shown, the court, upon motion, may enlarge or reduce the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of the prescribed time. The court may not enlarge or reduce the time for filing a notice of appeal or a motion to certify pursuant to App.R. 25. Enlargement of time to file an application to reconsider pursuant to App.R. 26(A) shall not be granted except on a showing of extraordinary circumstances."

Thus, the threshold question is, did appellant show good cause for filing his Rule 26(B) Application for Delayed Reconsideration more than 90 days after the journalization of the appellate decision which occurred on January 12, 1996? See *State v. Wickline* (1996), 74 Ohio St.3d 369.

It would seem that appellant has met the good cause standard for filing over ninety days after the journalization of the appellant judgment in that appellant was a layman in filing his application for delayed reconsideration *pro se*. From the time of the January 12th date at which this court affirmed the judgment of the trial court until the filing of the application for delayed reconsideration we are looking at approximately 133 days. Allowing for time in the mail and notification of the defendant-appellant of his denial of his original appeal it would not seem unreasonable to allow the extra period to file this instant action.

**4 Accepting that appellant has shown good cause for his delay in filing for reconsideration, appellant must still bear the burden of establishing a "colorable claim" of ineffective assistance of counsel as required by App.R. 26(B)(5) and that his claims are not barred by *res judicata*.

The standard of review to be applied when assessing a defense request for reopening of appeal under App.R. 25(B)(5) is that of *Strickland v. Washington* (1984), 466 U.S. 668 and *State v. Bradley* (1989), 42 Ohio St.3d 136. See also the recent case of *State v. Reed* (1996), 74 Ohio St.3d 534.

The *Strickland* standard for ineffective assistance of counsel is that a defendant must demonstrate such serious errors of counsel that a defendant was prejudiced and, but for these errors, there was a reasonable probability that the result of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Therefore, to establish ineffective assistance of counsel, a defendant must show (1) deficient performance of counsel and (2) resulting prejudice to the defendant.

Also, appellant must bear the burden of showing that his claims are not barred by the doctrine of *res judicata*. Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceedings except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at trial, which resulted in that judgment of conviction or on an appeal from that judgment. See *State v. Perry* (1967), 10 Ohio St.2d 175, 176, paragraph nine of the syllabus.

Appellant's assignments of error all basically involve the following allegations:

1. That appellant was coerced into entering the guilty plea by his attorney when his attorney told him he would only receive a four year sentence and be released in two to two and one-half years;

2. That he was under the influence of anti-psychotic drugs at the time of the plea being entered;

3. That the trial judge should have recused himself since he had Parkinson's Disease;

4. That the trial court refused to hold a competency hearing;

5. That his attorney failed to investigate the case and there was no evidence that appellant was the perpetrator;

6. That his appellate attorney improperly argued the three original assignments of error in his first appeal;

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7. That there was a conflict of interest by his first attorney (who had himself removed from the case) who was a county judge and had signed appellant's arrest warrant, search warrant and set his bail.

In appellant's assignments of error one and two where appellant alleges that he was coerced into entering the guilty plea and under the influence of anti-psychotic drugs at the time of the plea, those arguments are *res judicata*. Clearly, both of those arguments could have been raised on his original appeal to this court.

**5 Both of those assignments of error also fail under the *Strickland* standard in that this court in its judgment and opinion of January 12, 1996 stated at page 4:

"In the present case, the record indicates that the trial court satisfied itself that appellant understood the nature of the charges against him and that he was informed as to the maximum penalties involved. (Tr. 4-7). The record further indicates that appellant acknowledged that he did understand the charges and penalties involved. (Tr. 4-7).

"In addition, the record indicates that Dr. Karpawich's evaluation was comprehensive. Dr. Karpawich's report discloses that appellant understood his rights and the nature of the proceedings against him."

Thus, appellant has failed to show that had these issues been raised in his appeal that there was a reasonable probability that the result of the trial would have been different.

In appellant's assignment of error 3 he alleges that the trial judge should have recused himself since he had Parkinson's Disease. Appellant has submitted no evidence and there is no evidence that Parkinson's Disease is a reason to recuse oneself. Parkinson's Disease is a nervous disorder and does not affect reasoning ability. In appellant's application to this court his Exhibit H was a letter from the Disciplinary Counsel of the Supreme Court of Ohio. In paragraph 2 of that report it states:

"The evidence in this matter does not suggest that Judge Burkhart is not capable of continuing to preside on the bench. While Judge Burkhart may suffer from Parkinson's Disease, it does not appear that the illness has affected his ability to review cases coming before him and make competent determinations pertaining to said cases."

Hence, the fact that the trial court judge had Parkinson's Disease has not been shown by the appellant to constitute prejudice to the defendant.

In assignment of error 4, the appellant alleges that the trial court had refused to hold a competency hearing and that his trial counsel was ineffective for failing to object to this denial of a competency hearing. This assignment of error is *res judicata* in that it was raised in assignment of error 1 at the appellant's original appeal to this court and fully addressed by this court. This court, in its January 12, 1996 decision at page 5 stated:

"The record herein reveals that appellant's plea was made knowingly, intelligently and voluntarily. Further, the record herein fails to reveal indicia of appellant's incompetency. As such, we find that appellant's first assignment of error is without merit."

In appellant's assignment of error 5 appellant alleges that his attorney failed to investigate the case and there was no evidence that appellant was the perpetrator. This assignment of error is also *res judicata*. Appellant's second assignment of error in his original appeal to this court stated in part: " * * * and failed to conduct a reasonable investigation or defense." Appellant's allegation that his trial court counsel failed to conduct a reasonable investigation into this case was reviewed by this court under the *Strickland* standard and this court found that assignment to be without merit. At page 6 of the appeal from the Common Pleas Court case, this court stated in part: " * * * there is no indication from a review of the record that appellant was prejudiced by any action or inaction of counsel."

**6. In appellant's assignment of error 6 appellant argues that appellate counsel improperly argued the three original assignments of error on his first appeal. This assignment of error is without merit and fails under the *Strickland* standard. There is no evidence that this method of argument by his appellate counsel was deficient. There was also no evidence that had his attorney argued the three assignments of error together the result would have been different. Also, this court addressed each of these assignments of error on appellant's original appeal.

In his last allegation, appellant alleges that there was a conflict of interest by his first assigned attorney (who had himself removed from the case) who was a county judge and had signed appellant's arrest

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warrant, search warrant and set his bail. This issue is also *res judicata* in that it could have been raised in his first appeal as of right to this court. An independent review of this issue indicates that appellant has not shown any specific instances where any action or inaction of his original court appointed attorney was deficient in any manner so as to prejudice the defendant-appellant in his original trial. Clearly there was a conflict of interest (this was admitted by the original attorney, see appellant's Exhibit I) but there is no indication that this conflict of interest resulted in any resulting prejudice to the defendant. Appellant's original attorney took extra precautions to insure that appellant would not be prejudiced until a new attorney could be appointed. (See appellant's Exhibit J).

Although appellant has seemingly met his burden of showing good cause for delaying filing of this Rule 26(B) Application for Delayed Reconsideration, he has not met the requirements of establishing a "colorable claim" of ineffective assistance of counsel. Also, many of his arguments in this case were argued on direct appeal and are *res judicata*.

This Application for Delayed Reconsideration is denied.

O'NEILL, P.J., and DONOFRIO and COX, JJ., concur.

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COURT OF APPEALS FILED
1997 FEB 11 A 11:45
LUCAS COUNTY, OHIO
HARRY BARLOS
CLERK OF COURTS

IN THE COURT OF APPEALS OF LUCAS COUNTY

State of Ohio — Appellee

Court of Appeals No. L-84-143

Trial Court No. CR 83-6315

v.

Joel Sparks

Appellant

DECISION AND JUDGMENT ENTRY

Decided: FEB 11 1997

* * * * *

Appellant has filed an application for reopening based upon a claim of ineffective assistance of appellate counsel.

Appellant was convicted of murder in December 1983; this court affirmed that conviction in 1984. See State v. Sparks (Dec. 14, 1984), Lucas App. No. L-84-143, unreported. Since that time, appellant's case was assigned for review by the Ohio Public Defender Commission. Appellee has filed no response to the motion.

App. R. 26(B)(5) provides that an application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of appellate counsel. An application for reopening must be filed within ninety days from journalization of the appellate judgment, unless the applicant shows good cause for filing at a later time. App.R. 26(B)(1).

EXHIBIT

JOURNALIZED
FEB 12 1997

In this case, appellant asserts that although trial counsel objected to an allegedly improper jury instruction as to the affirmative defense of self-defense and the duty to retreat from one's own home, his appellate counsel failed to argue such error on direct appeal. As a result of this failure, appellant contends that he was denied effective assistance of counsel.

In order to prove ineffective assistance of counsel, a defendant must show 1) that defense counsel's representation fell below an objective standard of reasonableness and 2) that counsel's deficient representation was prejudicial to defendant's case. State v. Bradley (1989), 42 Ohio St.3d 136, paragraph two of the syllabus, citing Strickland v. Washington (1984), 466 U.S. 668.

In this case, we conclude that the failure to assert an assignment of error as to the self-defense jury instruction creates a genuine issue as to whether the applicant was deprived of the effective assistance of appellate counsel. This proposed error was not discovered until recently reviewed by the Ohio Public Defender's office.

Accordingly, in the interest of justice, appellant's motion for reopening, limited to arguments related to the self-defense jury instructions, is well-taken and granted. The clerk for Lucas County Court of Appeals is granted 20 days from the date of this decision in which to reassemble the record. Appellant will have 20 days from the date of notice of transmission of the record in which to file his brief.

JOURNALIZED

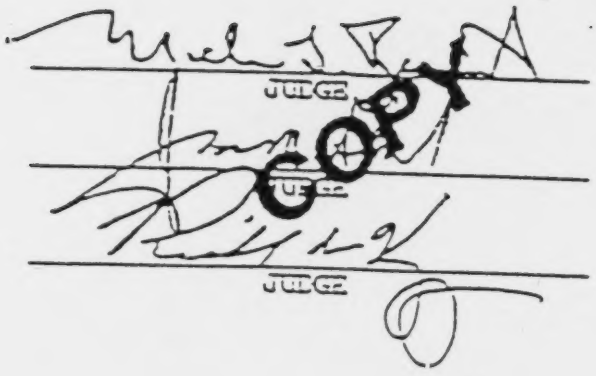
FEB 12 1997

Cassette 209 A-10

Melvin L. Resnick, P.J.

James R. Sherck, J.

Richard W. Knepper, J.
CONCUR.



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FEB 12 1997

NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

STATE of Ohio, Plaintiff-Appellee,
v.
Samuel WILLIAMS, Defendant-Appellant.

88-J-26.

Court of Appeals of Ohio, Jefferson County.

June 1, 1995.

Criminal Appeal from Common Pleas Court Case No. 87-CR-70. Reversed and Remanded.

Stephen M. Stern, Pros Atty., Debra Romantic-Boros, Asst. Pro Atty., Steubenville, for plaintiff-appellee.

James Kura, Ohio Public Defender, Kort Gatterdam, Asst. State Public Defender, Ohio Public Defender Com'n, Columbus, for defendant-appellant.

OPINION

DONOFRIO, Judge.

*1 This matter was previously before this court on direct appeal. On July 3, 1990, this court entered its affirmance of a jury verdict wherein defendant-appellant, Samuel Williams, was convicted of aggravated murder following a trial in the Jefferson County Common Pleas Court in June of 1988. The same attorneys which handled the trial and the previous appeal then filed an appeal with the Ohio Supreme Court. The Supreme Court dismissed the appeal on December 19, 1990.

On October 7, 1992, appellant, by and through new counsel, filed an application for delayed reconsideration based upon the Ohio Supreme Court's decision in State v. Murnahan (1992), 63 Ohio St.3d 60. Murnahan permits a delayed claim of ineffective assistance of appellate counsel. The basis of that application was appellate counsel's failure to assign as error certain "acquittal first" instructions that were given to the jury before they could consider a lesser included offense, a violation of the holding in State v. Thomas (1988), 40 Ohio St.3d 213, U.S. certiorari denied (1989), 493 U.S. 826. The holding in Thomas was announced subsequent to appellant's trial, but in time to raise the issue on appeal. Appellant's counsel did not raise the issue in appellant's first appeal.

The issue raised in this appeal centers on two instructions to the jury regarding the lesser included offense of murder. The first questioned instruction was given before the jury entered deliberations. The second questioned instruction was given the morning preceding the jury's second day of deliberations when the trial court gave amplified instructions as to how the jury should consider the lesser included offense of murder.

In appellant's first assignment of error, he contends:

"The trial court erred in instructing the jury that they must acquit appellant of aggravated murder before they could consider the lesser included offense of murder. Said error deprived appellant of his Ohio and United States constitutional rights to due process of law."

In appellant's second assignment of error, he contends:

"Appellant was deprived of his right to the effective assistance of trial and appellate counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section Ten of the Ohio Constitution when his trial counsel failed to object to an acquittal first instruction and the same counsel on appeal failed to raise the acquittal first issue."

Since this case is being considered by us pursuant to State v. Murnahan, supra, we must restrict our analysis to that portion of appellant's second assignment of error which

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claims a deprivation of effective assistance of appellate counsel. As such, the first assignment of error is overruled.

With the foregoing in mind, error by the trial court as claimed by appellant must be such that previous appellate counsel should have raised it in the original appeal of this action. Further, counsel's failure to do so must have resulted in prejudice to the appellant. We thus begin with first determining if the instructions at issue were in fact error.

*2 In State v. Thomas, supra, the Ohio Supreme Court referred to instructions wherein a jury is told that they must unanimously find a defendant not guilty of an offense before considering a lesser included offense as an "acquittal first" instruction. The Supreme Court then indicated in Thomas, at 219-220, that:

> "*** We reject the 'acquittal first' instruction approved by the court of appeals below because such an instruction encroaches on the province of the jury to decide questions of fact and to arrive at a verdict based on all the evidence before it and on all the various offenses on which it has been properly instructed.
> "The defendant's right to have the jury instructed on a lesser included offense is fundamental to providing defendant with a fair trial. *** Although the risk of coerced decisions may be present in any jury deliberation, *** the 'acquittal first' instruction exacerbates such risk."

Despite its holding in Thomas, the Supreme Court opted not to reverse the conviction of the defendant in that particular case. The instruction in question in the Thomas case reads:

> "'If you find that The State has proven beyond a reasonable doubt all of the essential elements of the crime of aggravated murder, then your verdict must be that the Defendant is guilty of aggravated murder; and you will not consider the lesser offense.
> "'However, if you find that The State has failed to prove beyond a reasonable doubt the element of prior calculation and design, then your verdict must be that the Defendant is not guilty of aggravated murder.
> "'You will then proceed with your deliberations and decide whether The State has proven beyond a reasonable doubt all of the essential elements of the lesser crime of murder.'" State v. Thomas, supra, at 220

The Supreme Court found that the above instruction did not expressly require a unanimous acquittal on the charged crime before the jury was permitted to consider the lesser included offense. The Supreme Court indicated that this instruction addresses possible disagreement by the jury on an element of the crime and a corresponding inability to reach a verdict of aggravated murder.

The Supreme Court went on to state that this instruction has negligible coercive potential because it speaks to the jury's inability to find, whether unanimously or not, a certain element of the greater offense. The court went on to affirm the conviction of aggravated murder while stressing that a better instruction would have been to incorporate the "inability to agree" language adopted by the court in its opinion.

The trial court's instructions that are first questioned in the present case are as follows:

> "Finally you may find that the Defendant is not guilty of both the charge of aggravated murder and the specification. Any of these verdicts reached by your body must be unanimous.
> "If you find that the State has failed to prove each and every element of the crime of aggravated murder as I have instructed you, you will then return a verdict of not guilty to that charge. At this point you will then continue to deliberate and determine whether or not the Defendant is guilty of the lessor (sic.) included charge of murder." (Tr. 760)

*3 In the present case, appellee, State of Ohio, contends that these jury instructions given after trial did not expressly require a unanimous "not guilty" verdict before

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consideration of the lesser included offense. Appellee contends that these instructions were very similar to the instructions given in the Thomas case, which were approved by the Supreme Court.

We agree with appellee that these instructions are very similar to the Thomas instructions. In reading both instructions, they are very close in wording and in how we would interpret them. According to Thomas, both are acceptable. Appellant emphasizes that the paragraph prior to the first instruction refers to the fact that "Any of these verdicts reached by your body must be unanimous." This reference was to several possible verdicts referred to prior to the instruction in question. We feel that this instruction when read in total with all of the other instructions given right after the trial, as in Thomas, did not expressly require a unanimous acquittal before considering the lesser included offense.

A review of this court's journal entry of November 13, 1992 permitting appellant's application for delayed reconsideration indicates that when this first instruction is read in total it does not create substantial grounds for relief.

> "If you find that the State has failed to prove each and every element of the crime of aggravated murder as I have instructed you, you will then return a verdict of not guilty to that charge. At this point you will then continue to deliberate and determine whether or not the Defendant is guilty of the lessor (sic.) included charge of murder." (Tr. 760)

As in Thomas, this instruction has "negligible coercive potential" because it speaks to the jury's inability to find, whether unanimously or not, all elements of the greater offense.

We are not persuaded that this instruction, which was given before the jury began deliberations, unduly prejudiced the appellant. Thus, we do not find prejudicial effect with this instruction although a better instruction would have been to incorporate the "inability to agree language" that Thomas adopted. Even though the instruction may have been somewhat confusing and ambiguous, as in Thomas, it is our finding that when read as a whole with the balance of instructions it is not prejudicial. Therefore, trial counsel was not ineffective in failing to object to it. Further, ineffective assistance of appellate counsel did not occur by appellate counsel failing to question this instruction on appeal.

The second instruction at issue was given on the morning of the second day of deliberations after the jury was unable to reach a verdict. The court instructed the jury that:

> "*** You are really into a situation of just determining in accordance with the instructions you received on reasonable doubt as to whether or not the State proved its case beyond a reason able (sic.) doubt against the defendant. And your possibilities are he is guilty of aggravated murder, if you don't agree on that and you are unanimous in that, they (sic.) you can decide if he is guilty of murder. If you agree that he is, you return a verdict of guilty of murder. If you don't think he is guilty of that and you are unanimous, return the two verdicts of not guilty." (Tr. 782)

*4 Appellee asserts that the second instruction can be read to require a unanimous "guilty" verdict or a unanimous indecision but does not require a unanimous "not guilty" verdict. We disagree.

We find that the second instruction is a violation of the acquittal first prohibition as set out in Thomas. Prior to the second day of deliberation, the trial court gave these amplified instructions on its own. In appellant's initial appeal, this court indicated that amplified instructions are frowned upon. Part of the reason for this is that they may sometimes be taken out of context or unduly emphasized.

This instruction clearly and expressly required a unanimous not guilty verdict prior to deliberating on the lesser included offense as prohibited by the Supreme Court's later released decision in Thomas.

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We must now consider whether the improper jury instruction would have required a reversal of appellant's conviction if initially brought up on appeal. As previously stated, we find that this instruction given by the trial court expressly required a unanimous acquittal on the charge of aggravated murder before the jury was permitted to deliberate on the lesser included offense of murder. Pursuant to the holding in Thomas, supra, and in accordance with the reasoning of the Second District's case of State v. Shaw (1990), 65 Ohio App.3d 821, such an instruction constitutes prejudicial error and therefore warrants a reversal. It has been stated that, "*** ordinarily it is prejudicial error to give an instruction which misstates the law ***." 5 Ohio Jurisprudence 3d (1978) 304, Appellate Review, Section 646.

Appellant contends that appellate counsel was ineffective in failing to raise the issue of ineffective assistance of trial counsel and in failing to raise the issue of the erroneous jury instruction on appeal. Because the decision in Thomas was not released until subsequent to the trial of appellant, ineffectiveness of trial counsel is not a meritorious issue. However, appellate counsel was ineffective in failing to raise the second jury instruction as an issue on appeal.

Thomas was decided by the Ohio Supreme Court on December 30, 1988. Appellant's conviction was journalized June 22, 1988. Notice of appeal was filed July 20, 1988. Due to the length of the transcript, it was not filed until May 31, 1989. Appellant received several extensions to file his brief and eventually filed same on October 24, 1989. Appellee filed its brief on November 22, 1989. Oral argument was heard April 17, 1990. This court's opinion was released July 3, 1990.

As can be seen, appellate counsel had ample time to become aware of the Thomas decision and its implications. Failure to raise error in regard to the second jury instruction was ineffective assistance of appellate counsel that resulted in prejudice to appellant. See Strickland v. Washington (1984), 466 U.S. 668. This omission by appellate counsel affected the result of appellant's first appeal. Therefore, appellant's second assignment of error is with merit.

*5 For the foregoing reasons, the judgment of the trial court is reversed and this cause remanded for further proceeding consistent with this opinion.

O'NEILL, P.J., concurs.

COX, J., concurs.

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*456453 NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

STATE of Ohio Appellee
v.
Marlon **FLOWERS** Appellant

No. L-92-337.
Court of Appeals of Ohio, Sixth District, Lucas County.
July 10, 1998.

Julia R. Bates, prosecuting attorney, and Brenda Majdalani, for appellee.

Spiros Cocoves, for appellant.

OPINION AND JUDGMENT ENTRY

RESNICK, J.

**1 This case is before the court following our May 27, 1997 decision which granted appellant's application for reopening, pursuant to App .R. 26(B), based upon a claim of ineffective assistance of appellate counsel on direct appeal.

The pertinent facts are as follows. On September 9, 1991, appellant, Marlon Trent **Flowers**, was indicted on one count of felonious assault with a firearm and physical harm specification. The case was dismissed on October 7, 1991. During this time, appellant was being held in jail on the charge of drug abuse (case number CR91-6459). On October 17, 1991, appellant was sentenced to one year in prison for the drug abuse charge. He was granted fifty-one days credit for time served.

While serving his sentence for drug abuse on January 13, 1992, appellant was again indicted for felonious assault with a firearm and physical harm specification. The indictment was for the same offense appellant was indicted for in September 1991. Appellant was arrested for the offense on May 11, 1992. A trial was scheduled for June 16, 1992. On June 16, 1992, the trial date was continued to June 23, 1992. On June 23, 1992, the trial date was once again continued to July 14, 1992. On July 9, 1992, the trial date was continued for the last time until August 12; 1992. On August 13, 1992, a jury found appellant guilty as charged. He was sentenced to prison for not less than seven nor more than fifteen years in prison.

Pursuant to R.C. 2945.71(C), a person against whom a charge of felony is pending, such as felonious assault, shall be brought to trial within two hundred seventy days after his arrest. Each day the accused is held in jail in lieu of bail on the pending charge counts as three days for purposes of the speedy trial computation. R.C. 2945.71(E).

The issue before this court is whether or not appellant was brought to trial within two hundred seventy days in compliance with R.C. 2945.71. Appellant was initially indicted for felonious assault on September 9, 1991. The charge was dismissed on October 7, 1991. That period of time, twenty-eight days, is chargeable to the state. *State v. Bonarrigo* (1980), 62 Ohio St.2d 7, 402 N.E.2d 530. From October 7, 1991 until his reindictment on January 13, 1992, ninety-eight days elapsed. This time is not counted for purposes of R.C. 2945.71 as the charge of felonious assault was not pending. On May 11, 1992, appellant was arrested and placed in custody for the charge of felonious assault. At that point, one hundred nineteen days for purposes of R.C. 2945.71 had elapsed for a total of one hundred forty-seven days (28 + 119 = 147).

Appellant was in custody from May 11, 1992 until the day he actually went to trial on August 12, 1992 (93 days). In his application for reopening, appellant alleged that his counsel was ineffective in failing to show that appellant had been released from prison on the drug abuse charge prior to his arrest for felonious assault. On direct appeal, this court noted there was no evidence that appellant had been released in April 1992. The only evidence of appellant's incarceration status was the docket sheet showing that appellant had received a year sentence for drug abuse. Even after calculating the days appellant was credited for time served, there was no evidence before the court that he was not still in prison on the drug abuse charge. This court, relying on the validity of the trial court record, did not credit appellant with triple time during the period of May 11, 1992 to August 12, 1992, because appellant was not in custody solely on the pending charge of felonious assault. This interpretation led to the conclusion that appellant was brought to trial within two hundred seventy days (147 + 93 = 240).

**2. On April 14, 1997, appellant filed a *"pro se* application to reopen direct appeal pursuant to Ohio Rules of Appellate Procedure Rule 26(B)." Appellant argued that his appellate counsel was ineffective in failing to present pertinent documentation in support of his speedy trial argument. Appellant submitted documentation in support of his argument. In finding appellant's application well-taken, this court found the documentation to be "ambiguous" but stated that the "documentation nevertheless suggests appellant's claims *may* have merit." In other words, if it could successfully be shown that appellant was released from prison on the drug abuse charge on April 24, 1992, he would be entitled to use the triple count provision when calculating his incarceration

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time from May 11, 1992 until August 12, 1992 (93 X 3 = 279). This is because appellant would have been held solely on the pending charge of felonious assault. Application of the triple count provision would lead to the conclusion that appellant was not brought to trial within two hundred seventy days (147 - 279 = 426).

In granting appellant's application for reopening, this court was not ruling that appellant proved he had been released from prison on the drug abuse charge in April 1992. We merely acknowledged the possibility that appellate counsel had ignored crucial documentation or other evidence that may have changed the outcome of appellant's direct appeal. Rather than shedding some light on this "ambiguous documentation," the parties in their briefs have chosen to accept as fact that appellant was released on April 24, 1992.

We are therefore only left to review the documents appellant originally submitted in his application. The first document appellant submitted was from the Ohio Department of Rehabilitation and Correction. The document was titled "expiration of sentence." The document, dated April 24, 1992, acknowledged that appellant had successfully completed a prison sentence. Nothing in the document, however, identifies exactly what sentence appellant successfully completed. The other piece of documentation submitted by appellant was an arrest report showing that he was arrested for the charge of felonious assault on May 11, 1992. Once again, we cannot tell from this document whether or not appellant had been released from prison on the drug abuse charge on April 24, 1992.

Accordingly, appellant has not shown that his appellate counsel was ineffective and his sole assignment of error is found not well-taken. The court finds that substantial justice has been done the party complaining, and the judgment of the Lucas County Court of Common Pleas is affirmed. Costs assessed to appellant.

JUDGMENT AFFIRMED.

PETER M. HANDWORK, P.J., MELVIN L. RESNICK, J., JAMES R. SHERCK, J., CONCUR.

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*308390 NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

STATE of Ohio, Plaintiff-Appellee.
v.
Gordon C. NEWLIN, Defendant-Appellant.

No. 87AP-222.
Court of Appeals of Ohio, Franklin County.
Aug. 5, 1993.

Michael Miller, Pros. Atty., Patrick E. Sheera and Joyce S. Anderson, for appellee.

Dennis C. Belli, for appellant.

DECISION

ON MOTION FOR DELAYED RECONSIDERATION

DESHLER, Judge.

**1 Defendant-appellant, Gordon C. Newlin, has filed an application for delayed reconsideration of this court's decision in *State v. Newlin* (June 23, 1988), Franklin App. No. 87AP-222, unreported (1988 Opinions 2226), wherein this court affirmed judgments of the Franklin County Court of Common Pleas finding defendant guilty of aggravated murder and involuntary manslaughter and various other counts in the indictment unrelated to the issues now before the court. The trial court found the involuntary manslaughter count merged with the aggravated murder count and, therefore, did not sentence defendant on the former. Defendant was sentenced to life imprisonment for the aggravated murder of Laura Carter. Following this decision, appellant filed a *pro se* motion for reconsideration which was generally denied, but allowed to the extent the appellant was ordered to be resentenced regarding one count of conspiracy pursuant to R.C. 2023.01(F).

In *State v. Murnahan* (1992), 63 Ohio St.3d 60, the Ohio Supreme Court delineated a procedure for filing a motion for reconsideration after the normal time for filing for reconsideration had expired. A criminal defendant may raise a claim of ineffective assistance of appellate counsel by applying for "delayed reconsideration" of his direct appeal in the court of appeals where the alleged ineffective assistance of counsel occurred. App.R. 26(B) became effective July 1, 1993. The rule now sets forth a procedure mandated by *Murnahan*, under the heading, "Application for Reopening."

Bringing an application for delayed reconsideration has been a two-stage process. In the first stage, the court of appeals must determine based upon the defendant's application, affidavits and portions of the record before it, whether the defendant has set forth a colorable claim of ineffective assistance of appellate counsel and, if so, whether such ineffective assistance of counsel prejudicially affected the outcome of defendant's direct appeal. If the court of appeals determines that defendant has made the requisite showing, the court shall then reinstate defendant's direct appeal, commencing the second stage of the process.

Appellant now claims his original appellate counsel was ineffective for failing to bring the following new assignments of error:

"Assignment of Error No. 8:

"The common pleas court erred to appellant's prejudice in (1) overruling defendant-appellant's exception to the jury charge with respect to the inconsistency between count one of the indictment, aggravated murder of Laura Carter and count nine of the indictment, involuntary manslaughter of the same victim, (2) instructing the jury that it was permissible to return inconsistent verdicts of guilty of both aggravated murder and involuntary manslaughter in respect to one victim, (3) after the jury returned verdicts of guilty upon both aggravated murder and involuntary manslaughter in respect to the same victim, failing to direct the jury to deliberate further with instructions that it may return a guilty verdict of either aggravated murder or involuntary manslaughter, but not both, and (4) entering a judgment of conviction upon the aggravated murder guilty verdict.

**2 "Assignment of Error No. 9:

"The prosecution having failed to prove that defendant-appellant specifically intended to cause the death of Laura Carter, the common please [*sic*] court erred to defendant-appellant's prejudice in denying his motion for a judgment of acquittal as to count one of the indictment, aggravated murder, and in instructing the jury that defendant-appellant may be found guilty of aggravated murder if a gunshot accidentally caused the death of Laura Carter."

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To proceed on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was so deficient that it was unreasonable under prevailing professional norms. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688. *State v. Seiber* (1990), 56 Ohio St.3d 4, 11. A defendant must then show that " * * * there is a reasonable probability that but for [his] counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland, supra*, at 694. Applying this standard to the case before us, we are unable to conclude that defendant's appellate counsel was ineffective within the meaning of *Strickland*.

Defendant alleges that his appellate counsel was ineffective for failing to raise various claims of error relating to the court's instructions and acceptance of the verdicts returned by the jury. The defendant first complains that error should have been asserted as a result of the trial court instructing the jury on aggravated murder and in a separate court of the indictment for involuntary manslaughter. Additionally, defendant claims counsel should have asserted error based on the trial court's answer to a jury question that permitted a verdict of guilty to be returned for both aggravated murder and involuntary manslaughter arising from the same incident. The defendant, relying principally on this court's decision in *State v. Tanner* (Dec. 31, 1991), 91AP-263 and 91AP-651, unreported (1991 Opinions 6169), argues that the court's instructions on the two homicide related charges and the court's answer to a jury question, as well as the acceptance of the verdict, was an error as the two offenses are inconsistent. He further argues the jury should not have been permitted to consider the aggravated murder charge and involuntary manslaughter charge unless the latter was identified as a lesser included offense.

The defendant, among other charges, was indicted for aggravated murder, R.C. 2901.03(A) and for involuntary manslaughter, R.C. 2903.04(A). The state proceeded to trial on the theory of transferred intent, there being no dispute that the actual victim of the shooting that occurred, Laura Carter, was not the intended victim. The indictment for involuntary manslaughter arose from the claim the defendant's action resulted in the victim's death while committing a felony, felonious assault. The record clearly reveals the state wanted to prosecute the two offenses separately as opposed to conceding that involuntary manslaughter would be before the jury as a lesser included offense. It is well-settled that involuntary manslaughter is a lesser included offense of murder. See *State v. Rohdes* (1986), 23 Ohio St.3d 225 and *State v. Kidder* (1987), 32 Ohio St.3d 279. The state argued that the two offenses, aggravated murder and involuntary manslaughter were consistent from the standpoint the concept of transferred intent, necessary to the establishment of intent involving aggravated murder, did not apply to involuntary manslaughter. The trial court accepted this argument over objections of trial counsel. The concept of transferred intent can apply to aggravated murder, as affirmed in *State v. Richey* (1992), 64 Ohio St.3d 353. Since involuntary manslaughter is a lesser included offense of murder and the greater degree of homicide cannot be committed without committing the lesser of the offenses, conviction on both is not inconsistent. The consideration of an offense as a lesser included offense is succinctly stated in *Kidder, supra*, wherein the court stated:

**3 "Again, to clarify, the entire lesser-included-offense analysis, for purposes of R.C. 2945.74, is as follows: an offense may be a lesser included offense of another only if (i) the offense is a crime of lesser degree than the other, (ii) the offense of the greater degree cannot, as statutorily defined, ever be committed without the offense of the lesser degree also being committed, and (iii) some element of the greater offense is not required to prove the commission of the lesser offense. Even though so defined, a charge on the lesser included offense is not required, unless the trier of fact could reasonably reject an affirmative defense and could reasonably find against the state and for the accused upon one or more of the elements of the crime charged, and for the state and against the accused on the remaining elements, which by themselves would sustain a conviction upon a lesser included offense."

Therefore, the trial court's consideration of the two offenses under the facts in this case did not result in prejudicial error. This court's decision in *Tanner, supra*, involved a different factual context and is not dispositive of the decision in the case *sub judice*. Even if it would be deemed inconsistent, there is authority for permitting inconsistent verdicts on separate counts. As stated, in *State v. Adams* (1978), 53 Ohio St.2d 223:

"2. The several counts of an indictment containing more than one count are not interdependent and an inconsistency in a verdict does not arise out of inconsistent responses to different couns [*sic*], but only arises out of inconsistent responses to the same count." (Citation omitted.) *Id.* at paragraph two of the syllabus.

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More importantly, the defendant has overlooked the impact of R.C. 2941.25(A), which states:

"(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of simular import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

As stated in *State v. Darga* (1985), 30 Ohio App.3d 54:

'However, R.C. 2941.25 has not been interpreted to mean that a person cannot be indicted or charged, tried, and found guilty of multiple offenses, even when they are allied offenses." (Citations omitted.) *Id.* at 56.

And as more specifically addressed in *State v. Kent* (1980), 68 Ohio App.2d 151, "[t]he allied offense statute merely provides that where allied offenses are present, the person can only be convicted of one of the offenses. *Conviction in this context means a judgment of conviction." Id.* at 154. (Emphasis added.) And, as stated in *State v. Henderson* (1979), 58 Ohio St.2d 171, a "conviction" is defined as more than a verdict or finding of guilty. *Henderson* states that a conviction means a combined occurrence of a plea or verdict and/or finding of guilty and the sentence imposed. Accordingly, a defendant may be prosecuted for and convicted of two similar offenses, but sentenced on only one conviction.

**4. While standing alone and in the manner it was answered, the trial court's response of "yes" to the jury's question of whether the jury could convict defendant of both aggravated murder and involuntary manslaughter was correct. While it was deserving of more explanation, we cannot conclude the answer given to the jury warranted the obvious necessity of a challenge by appellate counsel. For reasons already stated, the defendant was, under the facts presented, found guilty of both offenses and this is permissible considering the facts of this case, even though the jury was not instructed that involuntary manslaughter is a lesser included offense.

The defendant's other claim of ineffective assistance of appellate counsel is essentially a claim the trial court committed error by failing to dismiss the aggravated murder charge on motion for dismissal for insufficient evidence and for an error in instructing the jury erroneously that defendant could be found guilty of aggravated murder if a gunshot accidentally caused the death of Laura Carter. We do not find the court's jury instruction is literally as claimed by defendant and since the claim of failing to dismiss the aggravated murder count was considered in the defendant's original appeal, such issue is precluded by the doctrine of *res judicata*. The trial court's instructions on transferred intent were sufficient to avoid the application of the concept of "plain error." We cannot conclude that appellant's counsel's failure to raise either of these issues on appeal met the standards set forth in *Strickland, supra*. Thus, we find no merit in defendant's second assignment of error relating to ineffective appellate counsel.

The appellant has raised claims of ineffective assistance of appellate counsel for what amounts to a failure to advance claims of error that are without merit. Appellant has not shown prejudice or any conformity to the requirements established in *Strickland, supra*. In view of these circumstances, language from the case of *Engle v. Isaac* (1982), 456 U.S. 107, 102 S.Ct. 1558, is appropriate. " * * * We have long recognized, however, that the constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. * * * " *Id.* at 1575.

Based upon the foregoing, defendant's motion provides no substantive grounds for relief and, accordingly, defendant's application for delayed reconsideration is denied.

Motion for delayed reconsideration denied.

WHITESIDE and PETREE, JJ., concur.

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STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO)
)
Appellee)
)
v.)
)
TINA BORT)
)
Appellant)
)

C.A. NO. 96CA006597

JOURNAL ENTRY

This cause was heard upon appellant Tina Bort's motion to file an application to reopen instanter. This court granted appellant an extension of time to file her application to reopen, rendering the application due on August 25, 1997. Appellant filed the instant motion as well as an application to reopen, on September 8, 1997. This court notes that, in the application to reopen, appellant's current counsel ironically complains appellant's former counsel was ineffective because he failed to timely file documents with this court.

Upon consideration, the motion is granted.

John W. Reece
Judge

cc: Ivelisse Cruz, Assistant Public Defender, 8 East Long St., 11th Floor, Columbus, OH 43215.

Gregory A White, Prosecuting Attorney, 226 Middle Ave., Elyria, OH 44035.

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IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :

Plaintiff-Appellant, :

v. : CASE NO. 90-2287

ARNOLD R. MURNAHAN, :

Defendant-Appellee.

On Appeal from the Court of Appeals for Clark County, Ohio
Second Appellate District

BRIEF OF AMICUS CURIAE, ATTORNEY GENERAL OF OHIO

FILED
JAN 22 1991

LEE FISHER
Attorney General

JACK W. DECKER (0021285)
Assistant Attorney General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-5414

COUNSEL FOR AMICUS CURIAE

STEPHEN A. SCHUMAKER
Clark County Prosecutor

DAVID E. SMITH (No. 0020413)
Assistant Prosecuting Attorney
50 East Columbia Street
Springfield, Ohio 45502
(513) 328-2574

COUNSEL FOR PLAINTIFF-APPELLANT

RANDALL M. DANA
Ohio Public Defender

BARBARA A. FARNBACHER (No. 0036862)
Assistant Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43266-0587
(614) 466-5394

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The Appendices attached to the State's Merit Brief are incorporated by reference herein.

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INTEREST OF AMICUS CURIAE

The Ohio Attorney General represents the State's interests in collateral attacks on criminal convictions which name as the respondent a state official, such as the warden of the correctional facility at which the petitioner is detained. This includes all Ohio prisoners' petitions for federal habeas corpus relief.

As explained herein, Ohio's procedural rules for handling claims of ineffective assistance of appellate counsel are important for determining the procedural posture of the same allegations in federal habeas corpus. The decision below indicates that at least some room for debate exists in Ohio as to the proper state procedural vehicle for raising claims of appellate ineffectiveness. To the extent Ohio procedural law is unclear, federal courts may hear such claims in the first instance, despite the refusal of Ohio courts to have reviewed them. This leads to a lack of respect for Ohio procedural requirements, both by federal courts and prospective federal litigants. Litigants aiming for federal habeas review have little incentive to obey Ohio procedural requirements, secure in the knowledge that the merits of their claims will be addressed by federal courts anyway.

Conversely, when Ohio procedural requirements are clear and evenhandedly applied, federal courts will respect them and refuse to entertain federal constitutional claims not previously presented to Ohio courts as required by Ohio procedure. Claims

defaulted for further Ohio review will be deemed defaulted for federal habeas review as well.

Therefore, this brief is filed to urge this Court to specify with particularity the Ohio remedies for ineffective assistance of appellate counsel, in order to insure that such claims will not rise up again, and be considered for the first instance, in federal habeas corpus.

STATEMENT OF THE CASE AND FACTS

This Office is in agreement with the Statement of the Case and Facts as set forth in the Appellant's Merit Brief.

ARGUMENT

Proposition of Law Number 1:

A CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IS NOT COGNIZABLE IN COLLATERAL POST-CONVICTION PROCEEDINGS PURSUANT TO R.C. 2953.21; SUCH A CLAIM MUST BE PRESENTED IN THE CHAIN OF DIRECT APPEAL, EITHER BY WAY OF A DIRECT APPEAL TO THE OHIO SUPREME COURT FROM THE JUDGMENT OF THE COURT OF APPEALS, OR ON AN APPLICATION FOR RECONSIDERATION IN THE COURT OF APPEALS PURSUANT TO OHIO APPELLATE RULES 26 AND 14(B).

This office consulted with and assisted the Clark County Prosecutor in briefing this appeal, and fully supports the prosecutor's position as detailed in his merit brief. This brief is therefore not intended to cover the same ground as the prosecutor has already thoroughly explored. Rather, the purpose of this brief is to stress the importance of a comprehensive decision in this appeal, from the viewpoint of post-conviction litigation once a case leaves the Ohio court system.

The procedural aspects of federal habeas corpus are dominated by the twin concepts of exhaustion of state remedies and waiver. Both have their roots in principles of federalism and comity, and both deal with the petitioner's failure to have given the state courts a fair opportunity to act on his claim before presenting the claim to the federal courts.

The exhaustion doctrine is codified at 28 U.S.C. Section 2254 (b) and (c), which has generally been interpreted to require a federal habeas claim first to have been fairly presented as a federal constitutional claim to the state's

highest court. See Anderson v. Harless (1982), 459 U.S. 4; Granberry v. Greer (1987), 481 U.S. 129. A claim which is presented using the wrong remedy is not fairly presented, because the state courts have not had a fair opportunity to act on it. Castille v. Peoples (1989), 489 U.S. 346. When a federal habeas petition contains an unexhausted claim which has not been forfeited in the state courts, the entire petition is ordinarily dismissed without prejudice to permit presentation of the claim to the state courts. Rose v. Lundy (1982), 455 U.S. 509. Otherwise, a claim which has not been fairly presented to the state courts, but cannot be re-raised under state law, is subject to a waiver analysis. See Ferguson v. Knight (6th Cir. 1987), 809 F.2d 1239, 1241-42; Meeks v. Bergen (6th Cir. 1984), 749 F.2d 322, 324.

Ordinarily, a habeas petitioner is not entitled to have a federal court review his claim when it was "not resolved on the merits in the state proceeding due to [petitioner's] failure to raise [it] there as required by state procedure." Wainwright v. Sykes (1977), 433 U.S. 72, 87. To hold otherwise would deter the orderly presentation of claims and encourage "sandbagging" in state court, defeat the finality of criminal litigation, and undermine considerations of comity and federalism. Id., 433 U.S. at 88-90; see also, Engle v. Isaac (1982), 456 U.S. 107; Henderson v. Kibbe (1977), 431 U.S. 145. The Sykes standard applies to claims that were not, but could have been, raised on appeal in the state courts. Murray v. Carrier (1986), 477 U.S. 478; Ewing v. McMackin (6th Cir. 1986), 799 F.2d 1143, 1150-51.

A question of waiver requires a four-part analysis, as summarized in Maupin v. Smith (6th Cir. 1986), 785 F.2d 135, 138-39:

1) A procedural default occurred when the petitioner failed to comply with a state procedural rule;

2) If the claim was presented at all, the state courts actually enforced the procedural rule barring the claim;

3) The state procedural rule is an "adequate and independent" ground to bar the claim; and

4) The petitioner has not shown sufficient cause for the procedural default, and prejudice as a result.

"Cause" for failing to have raised a claim on the first appeal of right consists of the novelty of the claim, some sort of "external impediment," or ineffective assistance of appellate counsel. However, to serve as "cause" for having defaulted a claim on state appeal, ineffective assistance of appellate counsel must first have been exhausted as an independent claim in the state courts. Murray v. Carrier.

When a federal habeas petitioner wants to raise a federal habeas claim that should have been raised on direct state appeal but was not, he most commonly cites as "cause" the ineffective assistance of appellate counsel. This, in turn, triggers a federal inquiry, within the above framework, whether an independent claim of ineffective assistance of appellate counsel has itself been exhausted or waived in state court.

The first stage of either an exhaustion or a waiver analysis requires the federal court to determine what the correct Ohio remedy is. Presently, the federal courts have

struggled with this question. After a series of inconsistent unreported district court decisions, the Sixth Circuit purported to settle the question in Manning v. Alexander (6th Cir. 1990), 912 F.2d 878.

Prior to this Court's decisions in Manning v. Alexander (1990), 50 Ohio St. 3d 127, and In re Petition of Brown (1990), 49 Ohio St. 3d 222, the district court had found Manning's claim of ineffective assistance of appellate counsel, which he had presented by way of an Ohio post-conviction petition, to be unexhausted because post-conviction was the wrong remedy, and Ohio habeas corpus appeared to be the correct one. Manning appealed this decision to the Sixth Circuit. Simultaneously, he filed an Ohio habeas petition which was dismissed by this Court in Manning v. Alexander. Then, on Manning's appeal from the district court decision, the Sixth Circuit reversed.

The Sixth Circuit reviewed several Ohio appellate decisions holding appellate ineffectiveness claims not to be cognizable in post-conviction proceedings, and several others which had apparently considered such claims where the cognizability issue was not raised. The court relied most heavily on State v. Howard (1989), 42 Ohio St. 3d 18, an appeal from the grant of post-conviction relief in which this Court, without addressing the cognizability question, had found appellate counsel to have been ineffective for failure to have challenged an Allen charge. The Sixth Circuit concluded that this Court would never had exercised jurisdiction over the Allen charge claim unless

ineffective assistance of appellate counsel were cognizable in post-conviction proceedings under Ohio law. Therefore, a claim of ineffective assistance of appellate counsel would be deemed exhausted for federal purposes if presented to this Court on an appeal from denial of post-conviction relief.

There are all kinds of problems with the Sixth Circuit's analysis in Manning, not the least of which were that court's failure to realize that Ohio courts do not usually consider issues that are not raised by either party, and the complete failure to apply principles of res judicata to Manning's claim. Worst of all, Manning creates a mismatch between Ohio and federal law. As matters now stand, litigants who raise appellate ineffectiveness claims under the wrong Ohio procedure in a majority of Ohio appellate districts have nonetheless exhausted their claims for federal purposes. Litigants who raise such claims at the earliest possible opportunity under Ohio procedure may or may not have exhausted their claims for federal purposes.

The federal-state mismatch is particularly problematic in death penalty cases, where the prisoner will typically assert in Ohio post-conviction proceedings that appellate counsel was ineffective for failure to raise a plethora of claimed trial errors. These claims are almost uniformly frivolous. Yet, such claims tend to complicate and delay Ohio post-conviction proceedings even if they are not addressed on cognizability grounds. But under Manning they are now deemed exhausted for

federal review, and will be reviewed on the merits there, appreciably prolonging federal habeas review in capital cases. Much of the incentive for raising such claims will be removed by requiring the death penalty appellant to raise such claims with new counsel before this Court on direct appeal.

Part, but not all, of the mismatch will be resolved by this Court's having answered, in the narrowest possible sense, the question certified to it. The federal courts are not constitutionally competent to prescribe matters of Ohio procedure. Henry v. Mississippi (1965), 379 U.S. 443, 447; McBee v. Grant (6th Cir. 1985), 763 F.2d 811, 815-16. The Sixth Circuit did not attempt to prescribe Ohio law in Manning, but simply endeavored to figure out what it was, for purposes of applying federal rules of exhaustion and waiver. If this Court concludes, as it must, that Manning incorrectly decided Ohio law, the effect would be to "overrule" Manning.

Even so, a narrow decision would not necessarily result in federal respect for Ohio procedural rules governing appellate ineffectiveness claims, unless this Court, in addition to holding what the remedy is not, also specified what the remedy is. If a federal habeas petitioner has failed to raise his ineffectiveness claim on direct appeal to this Court, but raises it in federal habeas corpus, the federal court may yet entertain his claim on the merits if, at the third stage of the Maupin analysis, it concludes the Ohio procedural rule not to be "adequate and independent."

Federal courts will not enforce a state procedural rule to preclude a litigant's federal claim unless that rule is both clearly announced and regularly enforced. Johnson v. Mississippi (1988), 486 U.S. 578; Hathorn v. Lovorn (1982), 457 U.S. 255, 262-65; Barr v. City of Columbia (1964), 378 U.S. 146, 149-50; Henry v. Mississippi, 379 U.S. at 448 n.3; see also, Reynolds v. Ellingsworth (3rd Cir. 1988), 843 F.2d 712, 719, cert. denied, 488 U.S. 960. "Exceptions" to the state rule, such as plain error, do not render the general "rule" unenforceable. Dugger v. Adams (1989), 489 U.S. 401, ___ n.6; Prihoda v. McCaughtry (7th Cir. 1990), 910 F.2d 1379, 1384-85; Meadows v. Legursky (4th Cir. 1990), 904 F.2d 903, 906-07, cert. denied, 111 S. Ct. 523; Hill v. Black (5th Cir. 1989), 887 F.2d 513, 516-17. The "adequacy" requirement merely protects the federal litigant against unanticipable or arbitrary applications of state procedural rules seemingly manufactured for the occasion.

We are of the opinion that the Ohio rules have been "adequate" ever since State v. Roberts (1982), 1 Ohio St. 3d 36, plainly announced that res judicata requires new claims arising in the court of appeals to be raised on further appeal to this Court, and since State v. Benton (1971), 27 Ohio St. 2d 87, strongly implied that the post-conviction statute does not encompass claims not implicating the judgment of the trial court. And enforcement of these rules looks less consistent than it is, when viewed from the viewpoint of the Ohio system as a whole, rather than the viewpoint of individual appellate

districts. Nonetheless, the impression remains that if the federal courts misinterpreted Ohio law in Manning, they may not hold federal habeas litigants to a higher standard of prescience until this Court definitively lays out the law.

To answer the question certified solely in terms of whether the post-conviction statute admits of appellate ineffectiveness claims may tell prospective litigants what the remedy is not, but not necessarily what it is. If the proper remedy is not defined, the way remains open for inconsistent and unexpected results in Ohio's appellate courts, and further disrespect for Ohio's procedural requirements on the federal level--and among prospective federal litigants. If prisoners have any incentive whatever to bring actions under the wrong Ohio remedies, the result must be wasteful to the resources of Ohio courts and prosecutors.

Conversely, if this Court addresses the interplay between the scope of the Ohio post-conviction statute and the doctrine of res judicata, and spells out how appellate ineffectiveness claims must be brought under a variety of circumstances, no one will have any excuse for mistaking his remedies for such a claim, and Ohio appellate courts will have adequate guidance for consistent application of the principle that claims of error must be raised at the earliest opportunity. Ohio procedural rules will then be "adequate" for federal purposes, because they will be well-defined and consistently enforced. Federal habeas

corpus review will then compliment state procedural rules by refusing to address claims not timely asserted as required by Ohio procedure.

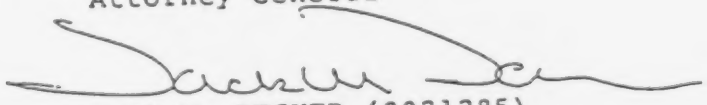
If Ohio remedies are well-defined, prospective federal litigants will have no incentive but to raise their claims at the earliest possible opportunity. All Ohioans' interests will be well-served by such a result. Meritless claims can be disposed of quickly. If a claim has merit, quick corrective action is possible, and the guilty will not go free because the passage of time has made retrial impracticable.

CONCLUSION

For the reasons stated in the State's Merit Brief and herein, the Court should reverse the decision below. In so doing, the Court should prescribe with particularity a prisoner's remedies when he claims the ineffective assistance of appellate counsel.

Respectfully submitted,

LEE FISHER
Attorney General

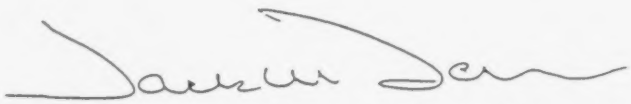


JACK W. DECKER (0021285)
Assistant Attorney General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-5414

COUNSEL FOR AMICUS CURIAE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Amicus Curiae has been forwarded to David E. Smith, Assistant Prosecuting Attorney for Plaintiff-Appellant, 50 East Columbia Street, Springfield, Ohio 45502, and also on Barbara A. Farnbacher, Assistant Ohio Public Defender for Defendant-Appellee, 8 East Long Street, 11th Floor, Columbus, Ohio 43266-0587, via the U.S. Mail, postage prepaid this 22nd day of January, 1991.



JACK W. DECKER (0021285)
Assistant Attorney General

*27 165 F.3d 27

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 10, FI CTA6 Rule 24 and FI CTA6 App. III, IOP 22 for rules regarding the publication and citation of unpublished opinions.)

William H. FOSTER, Petitioner-Appellant,
v.
Ronald D. EDWARDS, Warden, Respondent-Appellee.

No. 97-4218.
United States Court of Appeals, Sixth Circuit.
Sept. 23, 1998.

Before MERRITT, JONES, and SILER, Circuit Judges.

ORDER

William H. Foster, an Ohio state prisoner, appeals pro se a district court judgment dismissing his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254, as barred by the one-year statute of limitations in 28 U.S.C. § 2244(d). This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R.App. P. 34(a).

In 1994, a jury convicted Foster of murder and aggravated assault, both with gun specifications. He was sentenced to eighteen years to life imprisonment, plus six years on the specifications. His direct appeal was denied by the Ohio Court of Appeals and by the Ohio Supreme Court; the latter decision was filed on November 15, 1995. Foster also filed an application to reopen his direct appeal, pursuant to Ohio R.App. P. 26(B). That application was denied by the Ohio Court of Appeals and the Ohio Supreme Court; the latter decision was filed on June 5, 1996.

On May 1, 1997, Foster mailed to the district court an application to proceed in forma pauperis and his habeas corpus petition. The court received these documents on May 12. The motion for pauper status was denied on May 27, Foster paid the filing fee on June 6, and the petition was stamped filed on August 14, 1997. The district court sua sponte dismissed the petition as barred by the one-year statute of limitations in 28 U.S.C. § 2244(d). The court construed the petition as having been filed on the date of mailing. However, it did not consider whether the pendency of the appeal of the denial of the application to reopen should affect the running of the statute. The district court subsequently denied Foster's motion for reconsideration, addressing the issue of the application to reopen and finding that it did not affect the finality of the judgment of conviction.

In this timely appeal, the parties have briefed only the issue of whether the petition was barred by the statute of limitations. This court reviews the district court's conclusions in a habeas corpus proceeding de novo. *Levine v. Torvik*, 986 F.2d 1506, 1512 (6th Cir.), *cert. denied*, 509 U.S. 907, 113 S.Ct. 3001, 125 L.Ed.2d 694 (1993).

Initially, the parties debate in their briefs when this petition should be considered to have been filed. This court has recently addressed a similar issue in the context of a Title VII action. In *Truitt v. County of Wayne*, 148 F.3d 644, 648 (6th Cir.1998), the court held that the statute of limitations was tolled during the pendency of a motion for pauper status, until such time as the order denying the motion was presumptively received. The plaintiff then must pay the filing fee before the statute runs. Applying that holding to these facts, the statute would have been tolled from May 1, when Foster mailed the motion, until May 30, when he presumptively received the order denying it. The record shows that his prison account was debited for the filing fee on June 6, which would therefore become the filing date. With that background, it must still be determined if this petition was barred.

Under § 2244(d)(1)(A), the statute of limitations begins to run on the date on which the judgment became final by the conclusion of direct review. The district court concluded that the judgment in this case became final on November 15, 1995, when the Ohio Supreme Court denied Foster's direct appeal. However, we conclude that Foster's application to reopen his direct appeal should figure into the calculation of the running of the statute in some manner. Either the application to reopen rendered the judgment nonfinal until it was resolved on June 5, 1996, a proposition the district court rejected without citation to any authority, or it should count as a collateral review of the judgment which tolls the running of the statute under § 2244(d)(2), an option which the district court apparently did not consider. In either case, the petition under review was filed within one year of the pertinent date, June 5, 1996, considering that the statute was tolled during the pendency of the motion for pauper status.

*27_ Accordingly, the district court's judgment dismissing this petition as barred by the statute of limitations is vacated, and the case is remanded for consideration on the merits. Rule 9(b)(3), Rules of the Sixth Circuit.

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